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COMMERCE REGULATION BEFORE GIBBONS V. OGDEN:
INTERSTATE TRANSPORTATION ENTERPRISE
Albert S. Abel

MISSISSIPPI LAND DESCRIPTIONS
Jack H. Ewing

IMPLIED COVENANTS IN OIL AND GAS LEASES
H. P. Pressler, Jr.

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COMMERCE REGULATION BEFORE GIBBONS V. OGDEN: INTERSTATE TRANSPORTATION ENTERPRISE

*Albert S. Abel**

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules.

—*Oliver Wendell Holmes*

Once upon a time the people of the not yet united states wrote themselves a Constitution for a new government and the words they used in it must be supposed to have had some meaning to them. Afterwards for many years they lived under that charter and since one likes to believe, whatever the sins of the third and fourth generations, that the fathers were basically a law abiding outfit, it is assumed that they tried to conform their political conduct to the governmental precepts so lately expressed in their fresh new Constitution as they understood it. Then there arose a notable statesman-*cum*-judge, John Marshall, dogmatic in mind and positive in temperament, who expounded what their Constitution meant to him and, through the dignity of his position as Chief Justice of the United States Supreme Court, the impact of his personality on his brethren, and an expansiveness of political vision concordant with the course of an expanding nation, did it so convincingly that later generations have accepted that exposition as the true gospel and no gloss.

For the Commerce Clause—and specifically so much thereof as regards the states' power to regulate business enterprise—he voiced his convictions first and most notably in 1824 in *Gibbons v. Ogden*.¹ The world has never forgotten what he said there but it has little noted nor long remembered what his contemporaries were doing. That conduct, whether it retains any present relevance or no, surely ought still to retain some present interest. The meaning of the commerce clause at the very time the Constitution was adopted and ratified has elsewhere been elaborately if

*B.A., J.D., State University of Iowa; LL.M., S.J.D., Harvard; Professor of Law, West Virginia University.

¹⁹ Wheat. 1 (U.S. 1824).

somewhat tediously explored.² The *terra incognita* of commerce regulation before *Gibbons v. Ogden*, with its manifest presuppositions of constitutional power, has very recently been charted with respect to regulation of interstate transportation facilities.³ This is a sequel, a supplementary chart, assembling in like manner from like materials⁴ the information bearing on regulation of interstate transportation operations.

²Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment* (1941) 25 MINN. L. REV. 432.

³Abel, *Commerce Regulation before Gibbons v. Ogden: Interstate Transportation Facilities* (1947) 25 N. C. L. REV. 121.

⁴For federal legislation, the materials herein used are derived from an examination and digest of the contents of the first three volumes of the Statutes at Large, comprising the public laws for the period 1789-1823, also of the private laws for the same period, reprinted in the sixth volume. Due to variations in dates of publication, the various state laws serving as a basis of discussion do not cover a precisely identical period. While completeness of reference would have involved examination of all session laws throughout the period covered, the writer has been content to rely on codes or digests of the statutes published at approximately the date of *Gibbons v. Ogden*; some of these appeared slightly before and others slightly after that decision, thus causing the variations already referred to, but no materials later than the end of that decade have been used. It is believed that this gives a substantially accurate picture of the contemporary law. Where the information was disclosed in the source consulted, the date of original enactment has been stated in connection with each statute cited. In most cases, statutes merely continuing or altering in unimportant particulars earlier basic statutes are not cited (the same being true as to federal legislation), with an occasional exception where intervening circumstances, such as the adoption of the federal Constitution, or admission of a territory to statehood seemed to afford a special reason why particular notice should be taken of re-enactments. Private acts have not been exhaustively referred to, only such representative instances being cited as would suffice to show the prevalence of state regulation of a particular subject or in a particular manner. Where no digest or code of the period in question was available, the materials have been drawn from session laws either wholly or in some instances for such time after publication of the last such compilation as would bring the statutes down to 1825. Specifically, the following sources have been examined and digested: ALA. DIG. LAWS (Toulmin 1823); CONN. PUB. STAT. (1824); DEL. REV. STAT. (1829); GA. DIG. LAWS (Prince 1819); GA. DIG. LAWS 1820-1829 (Foster); ILL. TERR. SESS. LAWS, 1812, 1813, 1814, 1816-17, 1817-18; ILL. LAWS 1819, 1820-21, 1822-23, 1824; INDIANA TERR. LAWS 1801-1809 (Philbrick); INDIANA TERR. LAWS 1809-1816 (Ewbank & Piker); IND. ACTS 1817-18; IND. LAWS 1818-19, 1819, 1821, 1822, 1823 (special acts), 1825; KY. DIG. STAT. LAWS (Moorhead & Brown 1834—note, only materials to 1824 used); DIG. LA. ACTS 1804-27; ME. REV. LAWS (1821); MD. LAWS 1692-1839 (Dorsey—note, only materials to 1826 used); MASS. LAWS 1780-1807; MASS. LAWS 1807-1816; MASS. SESS. LAWS May 1816, May 1817, Jan. 1818, Jan. 1819, May 1819, Jan. 1820, Jan. 1822; MISS. REV. CODE (1824); 1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. 1804-24 (1842); N. H. COMP. LAWS (1830); N. J. REV. LAWS (1820); N. J. COMP. PUB. LAWS (1833—note, only materials to 1829 used); N. Y. REV. STAT. 1827-1828; N.C. REV. LAWS (1821); N.C. REV. LAWS 1821-1825 (Taylor's Revisal); Ohio LAWS 1820, 1822; Ohio SESS. ACTS, general acts 1822, 1825, 1826, 1827, local acts 1822, 1824, 1825, 1826, 1827; PA. LAWS 1700-1825; R.I. REV. LAWS 1822; S.C. DIG. PUB. STAT. LAWS (Brevard); 6 S.C. STATUTES AT LARGE (McCord); TENN. LAWS (Scott, 1820); VT. COMP. LAWS (1824); VA. REV. CODE (1819); VA. REV. CODE (Supp. 1833—note, only materials to 1829 used). In addition, the search has extended to all the contemporary state constitutions and to the first nineteen volumes of the ANNALS OF CONGRESS which only come down to the end of Jefferson's second administration in 1809 and thus does not coincide in time coverage with the statu-

Essential to traffic and intercourse as are the transportation system over which it flows and the vehicles and vessels in which it is carried, they constitute only its inert condition precedent. A further requisite is the intervention of human agents to utilize these facilities. So prominent is this latter that, for many at least, what comes first to mind when regulation of commerce is mentioned is the exercise of government control over the activity of those engaged in transportation. The conduct of persons furnishing transportation facilities towards their patrons, their employees, and the general public including the rest of the travelling public, and *vice versa*, is the dynamics of the enterprise for which the transportation plant supplies the static framework. Control over the one would seem to rest upon much the same assumptions as control over the other. How far, then, is the pattern of regulation of the relative rights and obligations of such persons in their mutual dealings consistent with the finding as to the transportation plant, that the states were deemed to have retained virtually a free hand notwithstanding the grant to Congress of the commerce power?

I. RATES AND CHARGES

The states treated the fixing of pilotage fees as a matter within their control.⁵ Ordinarily, it is true, their legislatures did not themselves prescribe a schedule of such charges. Rather, they delegated determination to appropriate administrative agencies, quite commonly the same agencies as were entrusted with the licensing and disciplining of pilots. The officially proclaimed fee schedule, once it was set, was quite clearly a regulation of rates for a service normally constituting an incident to interstate or foreign shipping; and the regulation was of importance to substantially the whole of such shipping using the ports of the state under the frequent compulsory pilotage laws discussed subsequently,⁶ since it formed a basis for determin-

tory materials but is believed to be fairly representative since it comprises periods of both Federalist and Republican domination and takes the account to the time when only one of the framers, Gilman of New Hampshire, remained in Congress as well as covering the entire first two decades of government under the Constitution. All reported decisions before *Gibbons v. Ogden* dealing with the commerce clause have been searched as have both the constitutional treatises then existing.

⁵See, e.g., Ind. Private Laws 1817-18, p.11; Ind. Acts 1825, p.51; 1 DIG. LA. ACTS (1804-1827) 517 (Mar. 31, 1805); *id.* 518 (June 7, 1806); *id.* 519 (Feb. 17, 1821); 2 ME. REV. LAWS (1821) 770; 1 MD. LAWS 1692-1839 (Dorsey) 249 (Apr. 1787); *id.* 257 (Nov. 1790); *id.* 483 (Nov. 1803); *id.* 797 (Dec. 1823, between particularly designated places); 1 MASS. LAWS (1789-1807) 109 (Oct. 24, 1783); 2 *id.* 776 (Mar. 10, 1797); Mass. Sess. Laws Jan. 1820, p.412; 1 N.C. REV. LAWS (1821) 451 (May 17, 1783); *id.* 482 (1784); *id.* 487 (1784); *id.* 765 (1794); *id.* 882 (1798); 2 N.C. REV. LAWS (1821) 1048 (1805); *id.* 1103 (1806); 4 PA. LAWS (1802-08) 67 (Mar. 29, 1803); 2 VA. REV. CODE (1819) 124 (1801); VA. REV. CODE (Supp. 1833) 386 (Feb. 15, 1820).

⁶These laws are treated *infra* p. 361.

ing the liability of even that part of it which might elect not to use the pilotage.

As revealed by the atypical statutes which did undertake the regulation in detail of pilot fees, the state regulations were by no means limited to prescribing the charges for the actual pilotage of the vessel. Waiting fees of pilots, for time consumed in necessary attendance upon the vessel for which he was engaged during quarantine or the like, were also fixed.⁷ What is more, if a pilot was carried to sea, the states required the payment of compensation and defined the basis for computing it.⁸ The latter charge is perhaps not a rate in the strict sense since it does not represent payment for any transportation service rendered. No more is it a regulation of contract terms in view of the wholly involuntary character of the circumstances giving rise to it. Rather, it would seem to be a statutory right created by the state against those in charge of the vessel, particularly significant to illustrate the scope of state control in that it arose, by definition, only against vessels engaged in extrastate journeys and from conduct most, and perhaps all, of which occurred beyond the borders of the state. The same may be said of the Pennsylvania statute providing that when a vessel, having taken on a Pennsylvania pilot, was forced by ice or other hindrances to navigation to proceed to some point outside Delaware River and Bay, it should pay the pilot full Philadelphia pilotage plus a liberal mileage allowance for his travel back.⁹

Some compulsory pilotage laws more particularly noted later exempted specified classes of vessels, and notably those of domestic registry, from the alternatives of taking on a pilot or paying part pilotage fees as a penalty. Another type of statute, approaching the matter somewhat differently, imposed an extra charge above and beyond the usual pilotage rates on foreign vessels.¹⁰ They share the assumption of the state's plenary power as to the exaction to be demanded of ships engaged in extrastate carriage, a power so ample as to permit discrimination against vessels on account of their non-state or non-national character.

Other sporadic instances of the extensive discretion of the states over pilot fees are to be found in the occasional statutes expressly providing that the same pilotage be charged for unregistered as for registered vessels

⁷¹ DIG. LA. ACTS (1804-27) 517 (Mar. 31, 1805); *id.* 518 (June 7, 1806); 1 MD. LAWS 1692-1839 (Dorsey) 483 (Nov. 1803); 4 PA. LAWS (1802-1808) 67 (Mar. 29, 1803).

⁸¹ DIG. LA. ACTS (1804-27) 517 (Mar. 31, 1805); 1 MD. LAWS 1692-1839 (Dorsey) 483 (Nov. 1803); 4 PA. LAWS (1802-1808) 67 (Mar. 29, 1803).

⁹⁴ PA. LAWS (1802-1808) 67 (Mar. 29, 1803).

¹⁰¹ MD. LAWS 1692-1839 (Dorsey) 483 (Nov. 1803).

belonging to United States citizens¹¹ or forbidding rate cutting by pilots and annexing a penalty for violation.¹²

Maritime traffic bore the brunt of another common type of charge whose amount was fixed by or pursuant to state legislation, namely, wharfage rates and harbor dues.¹³ Those so circumstanced that they would be affected by that character of rates would be certainly in some, perhaps in large part, engaged in navigation not confined within the limits of the enacting state. Nevertheless no doubt of the states' power to regulate the charges to be borne by those vessels engaging in interstate or foreign voyages was manifested. Quite the contrary. Some of the legislation expressly exempted from wharfage fees coasting vessels trading between ports in the enacting state,¹⁴ so that the regulation not merely extended but was actually confined to vessels operating to points beyond the state.

Tolls for the use of highways, waterways, and similar works were also freely regulated by the states. In so far as the toll was for the use of a state-erected and publicly maintained highway,¹⁵ the exaction was perhaps somewhat analogous to present day motor vehicle license fees and might be sustained on the same considerations. This was, however, a relatively infrequent case, most public highways and publicly improved natural water-courses being available to travellers without charge¹⁶ and most tolls being

¹¹4 PA. LAWS (1802-1808) 186 (Apr. 2, 1804).

¹²2 VA. REV. CODE (1819) 386 (Feb. 15, 1820).

¹³See GA. DIG. LAWS (Prince 1819) 433 (Mar. 12, 1774); 2 MASS. LAWS (1780-1807) 800 (Feb. 2, 1798); Ohio Local Acts, 1st Sess. 1824, p.45; 2 PA. LAWS (1780-1791) 54 (Sept. 20, 1782); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 483 (1778, amended 1807); 2 VA. REV. CODE (1819) 124 (Feb. 16, 1819); VA. REV. CODE (Supp. 1833) 394 (Mar. 3, 1821); *cf.* 1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. 1804-1824 (1842) 970 (charter of St. Louis, authorizing the city to regulate "the rates of wharfage at private wharfs," 1822); Ohio Local Acts, 1st Sess. 1825, p.61 (charter of Marietta, similar power); Ohio Local Acts, 1st Sess. 1827, p.46 (charter of Cincinnati, empowering city to erect municipal wharves and docks and to regulate wharfage thereat); 3 PA. LAWS (1791-1802) 274 (county commissioners authorized to regulate wharfage of public piers at Northern Liberties, Apr. 4, 1796).

¹⁴GA. DIG. LAWS (Prince 1819) 433 (Mar. 12, 1774); *cf.* VA. REV. CODE (Supp. 1833) 394 (exempting coasting vessels of small tonnage, such as were typically engaged in traffic with nearby points, unless the help of the harbor master was actually required, Mar. 3, 1821).

¹⁵See ALA. DIG. LAWS (Toulmin 1823) 388 (Dec. 16, 1819); CONN. PUB. STAT. (1824) 166 (public ferries); CONN. PUB. STAT. LAWS (1826) 493 (fee of footman at New London ferry); Ill. Laws 1822-23, p.142 (Shawneetown ferry); 1 N.Y. REV. STAT. (1827-8) 222-224 *passim* (particularly full and detailed prescription of the tolls due and the mode of seeing to their enforcement on the Erie and the Champlain Canals). Another group of exactions of similar character was sometimes imposed for the use of harbor facilities, see, *e.g.*, ALA. DIG. LAWS (Toulmin 1823) 854 (Nov. 21, 1818).

¹⁶It was otherwise, however, as to ferries and canals for which toll was ordinarily charged even when they were publicly owned and operated, typical instances being cited in the immediately preceding note.

annexed to the use of transportation facilities provided by private enterprise. As to such privately constructed travel facilities, state legislation on tolls abounded. The proprietors or licensees of every type of travel artery—turnpike roads,¹⁷ artificially improved watercourses,¹⁸ canals,¹⁹ bridges,²⁰ and ferries²¹—were authorized to collect tolls from those using the improvement. No distinction was drawn between traffic between interior points and that originating in or destined for places beyond the state, despite the often evident character of the improvement as a link in an interstate trade route as to which it was virtually certain that a part, sometimes a major part, of the goods and persons moving along it would be engaged

¹⁷DEL. REV. STAT. (1829) 520 (Feb. 1, 1808); *id.* 527 (Jan. 28, 1813); *id.* 531 (Jan. 23, 1811); ILL. LAWS 1819, p.119; ILL. LAWS 820-21, p.94; ILL. LAWS 1824, p.90; I DIG. LA. ACTS (1804-1827) 258 (Feb. 19, 1825); *id.* 275 (Mar. 7, 1820); 2 ME. REV. LAWS (1821) 600; 3 MASS. LAWS (1780-1807) 285 (Mar. 16, 1805); 1 N.Y. REV. STAT. (1827-8) 584; 3 PA. LAWS (1791-1802) 82 (Apr. 9, 1792); 4 PA. LAWS (1802-1808) 319 (Mar. 17, 1806); 5 PA. LAWS (1809-1812) 280 (Jan. 17, 1812); 2 TENN. LAWS (Scott 1820) 121 (Oct. 28, 1813); *id.* 242 (Nov. 14, 1815); VT. COMP. LAWS (1824) c.14 (Nov. 3, 1815); 2 VA. REV. CODE (1819) 211 (Feb. 7, 1817).

¹⁸ILL. Terr. Laws 1817-18, pp.8,57; ILL. LAWS 1824, p.96 (Wabash River); 3 PA. LAWS (1791-1802) 311 (Feb. 27, 1798); 4 PA. LAWS (1802-1808) 6 (Feb. 7, 1803); 8 PA. LAWS (1822-1825) 429 (Apr. 1, 1825).

¹⁹DEL. REV. STAT. (1829) 83 (Chesapeake & Delaware Canal, Jan. 29, 1801, amended Jan. 18, 1811); GA. DIG. LAWS 1820-1829 (Foster) 135 (Dec. 26, 1826); ILL. Terr. Laws 1817-18, p.57; ILL. LAWS 1819, p.121; ILL. LAWS 1824, p.160; IND. Private Acts 1817-18, p.57; 2 DIG. LA. ACTS (1804-1827) 88 (July 3, 1805); 2 MASS. LAWS (1780-1807) 786 (June 17, 1797); 3 *id.* 200 (Mar. 3, 1804); Mass. Sess. Laws, Jan. 1818, p.560 (Cape Cod Canal); 3 PA. LAWS (1791-1802) 114 (Apr. 10, 1793); 5 PA. LAWS (1809-1812) 266 (Apr. 2, 1811); 8 PA. LAWS (1822-1825) 177 (Apr. 1, 1823); *cf.* 1 S.C. DIG. PUB. STAT. LAWS (Brevard) 415 (1795).

²⁰DEL. REV. STAT. (1829) 575 (bridge on the Wilmington-Philadelphia highway, Jan. 30, 1801); ILL. Terr. Laws 1817-18, p.36 (bridge on the Vincennes to Belleville or St. Louis highway); ILL. LAWS 1819, p.44 (bridge on the Vincennes-St. Louis highway); *id.* 103, 366; ILL. LAWS 1820-21, p.145; *id.* 156; ILL. LAWS 1822-23, p.200; IND. LAWS 1822, p.97 (Ohio to Indianapolis highway); 1 DIG. LA. ACTS (1804-27) 134 (Feb. 18, 1817); *id.* 141 (on public highway to Natchez, Feb. 3, 1814); 2 MASS. LAWS (1780-1807) 572 (Mar. 26, 1793); 3 *id.* 242 (June 23, 1804); 3 PA. LAWS (1791-1802) 200 (Delaware River bridge at Easton, Mar. 13, 1795); *id.* 290 (Mar. 28, 1797); *id.* 312 (Mar. 16, 1798); *id.* 336 (Delaware River bridge at Trenton, Apr. 4, 1798); *id.* 436 (Mar. 15, 1800); 4 PA. LAWS (1802-1808) 156 (Delaware River bridge at Milford, Mar. 12, 1804); *id.* 297 (Mar. 10, 1806); 5 PA. LAWS (1809-1812) 111 (Delaware River bridge in Bucks County, Mar. 19, 1810); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 419 (Savannah River bridge, 1801); *id.* 476 (same, 1813); *cf.* GA. DIG. LAWS (Prince 1819) 400 (Dec. 6, 1805); 2 N.C. REV. LAWS (1821) 1073 (1806).

²¹ILL. LAWS 1819, p.28; ILL. LAWS 1824, p.79; INDIANA TERR. LAWS 1801-1809 (Philbrick) 352 (Sept. 17, 1807); IND. ACTS 1817-18, p.292; IND. LAWS 1821, p.146; KY. DIG. STAT. LAWS (Moorhead & Brown, 1834) title 79 (Dec. 22, 1806); 1 DIG. LA. ACTS (1804-1827) 264 (Mar. 18, 1820); 2 *id.* 532 (Feb. 7, 1827); 2 ME. REV. LAWS (1821) 768; 1 MD. LAWS 1692-1839 (Dorsey) 175 (May 1781); *id.* 425 (Nov. 1799); MISS. REV. CODE (1824) 350; 1 LAWS OF DIST. & TERR. LA. AND TERR. & STATE MO. (1842) 80 (July 9, 1806); *id.* 699 (Dec. 8, 1820); N.H. COMP. LAWS (1830) 181 (Feb. 20, 1783; N.J. REV. LAWS (1820) 408 (Feb. 6, 1799); OHIO LAWS 1820, p.171; 2 PA. LAWS (1780-1791) 332 (Sept. 6, 1785); R. I. REV. LAWS (1822) 410; 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 392 (1795); *id.* 399 (1796); 2 VA. REV. CODE (1819) c.237 (Jan. 30, 1819); *cf.* GA. DIG. LAWS (Prince 1819) 400 (Dec. 6, 1805).

in interstate journeying. Indeed, the exaction of tolls from interstate traffic—and its detention so far as needful for the collection of tolls—was underlined in turnpike statutes authorizing construction to the state line, there to join a road constructed under authority of a contiguous state, by the provision for erection of a tollgate just inside the state line.²² Other similar instances exist in state legislation for canal tolls on canals not serving any points within the state but designed solely to facilitate passage between or along boundary rivers,²³ tolls on interstate bridges,²⁴ and ferry charges on interstate ferries.²⁵

Sometimes co-ordination of rate policy between states was sought as instanced by a proviso, in enacting a rate schedule for bridges over a boundary river, that the rates set by the enacting state should always correspond with those prescribed by the other state conjointly authorizing the bridge.²⁶ On other occasions, as by requiring that ferry rates on boundary rivers from points on the opposite shore should be the same as those prescribed in the rate schedule of the enacting state,²⁷ that state plainly implied its dominant control of the rates for the interstate carriage.

Particularly if the consolidated laws empowered local authorities to establish facilities, those authorities were occasionally granted a broad general discretion to fix tolls²⁸ but ordinarily the method preferred was a

²²See, *e.g.*, DEL. REV. STAT. (1829) 520 (Feb. 1, 1808); 3 MASS. LAWS (1780-1807) 41 (June 19, 1801).

²³Ill. Terr. LAWS 1817-18, p.57 (Ohio River-Mississippi River Canal, near the mouth of the Ohio); Ind. Private Acts 1817-18, p.57 (canal at the Great Falls of the Ohio River); Mass. Sess. LAWS Jan. 1818, p.560 (Cape Cod Canal); *cf.* 1 S.C. DIG. PUB. STAT. LAWS (Brevard) 415 (expressly saving right of canal managers to charge toll on goods coming in from another state, where statute forbade generally any imposts or restrictions on the introduction of such goods, 1795).

²⁴PA. LAWS (1791-1802) 200 (Mar. 13, 1795); *id.* 336 (Apr. 4, 1798); 4 PA. LAWS (1802-1808) 156 (Mar. 12, 1804); 5 PA. LAWS (1809-1812) 111 (Mar. 19, 1810); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 419 (1801); *id.* 476 (1813).

²⁵Ill. LAWS 1822-23, p.142; Ill. LAWS 1824, p.79; Ind. LAWS 1821, p.146; 2 VA. REV. CODE (1819) c.237 (Jan. 30, 1819); *cf.* KY. DIG. STAT. LAWS (Moorhead & Brown 1934) title 79 (Dec. 22, 1806); 2 MASS. LAWS (1780-1807) 786 (June 17, 1797).

²⁶Mass. Sess. LAWS, Jan. 1820, p.421.

²⁷VA. REV. CODE (1819) c.237 (Jan. 30, 1819).

²⁸GA. DIG. LAWS (Prince 1819) 400 (bridges and ferries, Dec. 6, 1805); Ill. LAWS 1819, p.28; *id.* 44 (named bridge); *id.* 121 (named canal); *id.* 366 (named bridge); Ill. LAWS 1822-23, p.142 (county commissioners to fix rates for municipally maintained ferry); INDIANA TERR. LAWS 1801-1809 (Philbrick) 352 (Sept. 17, 1807); Ind. Acts 1817-18, p.292; KY. DIG. STAT. LAWS (Moorhead & Brown 1834) tit. 79 (Dec. 22, 1806); 2 ME. REV. LAWS (1821) 768; 1 MD. LAWS 1692-1839 (Dorsey) 175 (May 1781); *id.* 425 (Nov. 1799); 2 MASS. LAWS (1780-1807) 749 (Feb. 14, 1797); MISS. REV. CODE (1824) 350; 1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 80 (July 9, 1806); *•id.* 699 (Dec. 8, 1820); N.H. COMP. LAWS (1830) 181 (Feb. 28, 1783); N.J. REV. LAWS (1820) 408 (Feb. 6, 1799); 2 PA. LAWS (1780-1791) 332 (Sept. 6, 1785); VT. COMP. LAWS (1824) 377 (Mar. 3, 1797). Except where otherwise specifically indicated, all the above legislation dealt with ferry charges.

legislative classification of vehicles and other traffic using the improvement and the fixing by statute of a maximum permissible charge per trip for each category established. A difference between carriers or others frequently or regularly requiring the use of the improvement and casual occasional users was at times recognized and an attempt at corresponding accommodation of the tolls made by legislative authorization of a commutation of charges in return for a periodic payment.²⁹ The danger of extortionate and unauthorized exactions was sought to be minimized by provisions for publicity, requiring the posting³⁰ of scheduled rates at toll stations and on ferry and canal boats, and by annexing penalties to a demand of greater than legal rates of toll.³¹

Just as adjustment of railroad rates in the interest of the movement of particular commodities has proven a flexible instrument for the encouragement of particular industries or the effectuation of other objects of government policy, so, in the pre-railroad era, specially favorable tolls for navigation facilities were utilized in a similar fashion.³² A particularly striking instance of such manipulation of the rate structure is to be found in legislation discriminating in favor of articles of domestic origin by providing preferential rates for their carriage.³³ The climax is presented by a Massachusetts statute prescribing an elaborate hierarchy of tolls, so graded as to discriminate clear up the line from preference for local shipping to discriminatory distinctions between vessels based on the character of the foreign voyage from which they were returning.³⁴

That the states were amiably disposed to supply defects of Congressional power appears from the legislation giving approval to a levy of tolls by Congress on that part of the great trunk roads between states, congress-

²⁹See, *e.g.*, DEL. REV. STAT. (1829) 531 (annual fee, Feb. 1, 1816).

³⁰See GA. DIG. LAWS (Prince 1819) 401 (Dec. 22, 1808); ILL. LAWS 1819, p.28; 2 ME. REV. LAWS (1821) 600; 3 MASS. LAWS (1780-1807) 285 (Mar. 16, 1805); N.J. REV. LAWS (1820) 408 (Feb. 6, 1799); Ohio LAWS 1820, Second Part, p.286 (Jan. 7, 1811); *id.* 64 (penalty for defacing placard of tolls on toll bridge, Feb. 4, 1815); 2 VA. REV. CODE (1819) 211 (Feb. 7, 1817).

³¹See, *e.g.*, 2 ME. REV. LAWS (1821) 602; 3 MASS. LAWS (1780-1807) 285 (Mar. 16, 1805); N.J. REV. LAWS (1820) 408 (Feb. 6, 1799); VT. COMP. LAWS (1824) 161 (Nov. 3, 1815).

³²As, for example, by ILL. Terr. LAWS 1817-18, p.8, prescribing half toll for vessels carrying coal, lime, iron, or other ore, or household furniture.

³³See ILL. LAWS 1824, p.160 (lower rates on proposed Lake Michigan-Illinois River Canal for articles of domestic growth, produce, or manufacture).

³⁴Mass. Sess. Laws Jan. 1818, p.560 (prescribing tolls for the Cape Cod Canal, in the following order, reading from lowest to highest: (1) ballasted vessels, empty vessels, vessels carrying four bulky commodities primarily supplied locally; (2) vessels engaged in the coasting trade; (3) those trading to the West Indies and British North America; (4) those trading to the seacoasts of the Atlantic; and (5) vessels rounding Cape Horn or the Cape of Good Hope).

sionally located and constructed with state assent, which lay within the borders of the state.³⁵

With few and inconsiderable survivals, most notably in connection with tollbridges, changing modes of transportation have rendered obsolete this form of private enterprise. It is no longer common for a carrier or traveller, himself furnishing the vehicle and the motive power, to purchase from another only the right to use a channel of transportation prepared or improved by another individual or corporation. Typically the whole complex—vehicle, motive power, and services attendant upon the transportation, as well as the roadway—is now supplied as an aggregate by the same entrepreneur³⁶ and the charge by way of toll for the highway has accordingly been fused in the single undifferentiated rate for carriage. This fusion has deprived the formerly common toll of any significant modern counterpart; it should not be allowed to obscure the fact that that levy is one of the components in the familiar transportation rate of today. In essence, regulation of tolls was regulation of rates of a limited and special character.

By the imposition of penalties, the states undertook to protect the financial interests of persons furnishing transportation facilities in the event of the forcible or fraudulent evasion of tolls by users of those facilities;³⁷ and to the same end they directed that the tonnage of boats and the size of rafts be ascertained and plainly marked on watercraft which used tollable canals and improved waterways.³⁸

Congress exercised jurisdiction over rates and charges only in the matter of tolls for canals,³⁹ turnpikes,⁴⁰ and the like within the District of Columbia and, as already noted, by the sufferance of the states, for the interstate trunk roads constructed by it within the body of the states. In empowering state corporations to extend their works across the District, Congress manifested an inclination to adopt by reference the toll schedule

³⁵Cf. 1 MD. LAWS 1692-1839 (Dorsey) 775 (Dec. 1821).

³⁶In some instances, for example, express companies, chartered ships, part of the above facilities are derived under a contract from a third person, but the individual user of the service deals only with the intermediate agency entitled under the contract and has little concern with the latter's arrangements which enable it to furnish the service.

³⁷See, e.g., Ill. LAWS 1819, p.366; 2 ME. REV. LAWS (1821) 601; 3 PA. LAWS (1791-1802) 470 (Feb. 25, 1801); 4 PA. LAWS (1802-1808) 7 (Feb. 11, 1803); *id.* 27 (Mar. 24, 1803); 5 PA. LAWS (1809-1812) 280 (Jan. 17, 1812); VT. COMP. LAWS (1824) 161 (Nov. 3, 1815).

³⁸1 N.Y. REV. STAT. (1827-28) 240; 3 PA. LAWS (1791-1802) 311 (Feb. 27, 1798); 8 PA. LAWS (1822-1825) 177 (Apr. 1, 1823).

³⁹See 2 STAT. 517 (1809).

⁴⁰See 2 STAT. 539 (1809); *id.* 570 (1810); 3 STAT. 5, 12 (1813); *id.* 391 (1817); *id.* 482 (1819).

prescribed by the parent state, for so much of the undertaking as lay within the District.⁴¹

II. OTHER RELATIONS WITH SHIPPERS AND PASSENGERS

The principles of the common law seem to have been mainly relied on to fix the relative rights and obligations as between persons using and persons furnishing facilities for transportation by land for there is a marked paucity of legislation in that connection. A primitive sort of passenger safety regulation seems, indeed, to be represented by legislation in some of the states against "reckless driving" of stage coaches for the conveyance of passengers, requiring those in charge of such vehicles to slacken pace in meeting and passing other vehicles on the highway,⁴² or forbidding them to drive so as to run against and hinder other stages,⁴³ or to run their horses, while drawing a stage on which there were passengers, or to permit the same to be run.⁴⁴ It was also forbidden to leave stage horses standing hitched to the stage unless they were either tied or under the charge and management of some responsible person.⁴⁵

Per contra, there was a very extensive range of state legislation governing the relations arising between carriers by water and their patrons. Considerable solicitude was displayed by a few states for the protection of the goods and especially of the passengers aboard vessels. Prohibitions were expressed against wilfully causing the collision of steamboats⁴⁶ or approaching closer than twenty yards to another steamboat travelling in the same direction⁴⁷ or closer than ten yards to a passing steamboat.⁴⁸ Steamboats meeting on the waters of the state were to pass to larboard.⁴⁹ An overtaken steamboat was forbidden to deviate from its course in order to hinder or prevent the passage of the overtaking vessel.⁵⁰ The position and character of lights to be displayed by steamboats in navigation⁵¹ or anchored in certain waters⁵² after dark was specified in detail. Steamboats landing their passengers at a wharf or upon another vessel were to be

⁴¹See 2 STAT. 808 (1813); 3 STAT. 391 (1817); *id.* 482 (1819).

⁴²CONN. PUB. STAT. (1824) 395.

⁴³N.J. COMP. PUB. LAWS (1833) 181 (Feb. 28, 1828).

⁴⁴1 N.Y. REV. STAT. (1827-28) 695; Ohio Sess. Laws, 1st Sess. 1827, p.67.

⁴⁵N.J. COMP. PUB. LAWS (1833) 181 (Feb. 28, 1828); 1 N.Y. REV. STAT. (1827-28) 696; Ohio Sess. Laws, 1st Sess. 1827, p.67; 7 PA. LAWS (1818-21) 254 (Mar. 6, 1820).

⁴⁶N.J. COMP. PUB. LAWS (1833) 179 (Feb. 28, 1828).

⁴⁷*Ibid*; 1 N.Y. REV. STAT. (1827-28) 684.

⁴⁸N.J. COMP. PUB. LAWS (1833) 179 (Feb. 28, 1828).

⁴⁹1 N.Y. REV. STAT. (1827-28) 683.

⁵⁰N.J. COMP. PUB. LAWS (1833) 179 (Feb. 28, 1828).

⁵¹*Ibid*; 1 N.Y. REV. STAT. (1827-28) 684.

⁵²1 N.Y. REV. STAT. (1827-28) 685 (Hudson River, north of the Battery, and Lake Champlain).

stopped for at least a minute while the transfer was in progress;⁵³ and, if the landing was effected in small boats, the engines of the steamboat were to be stopped until the boat with the passengers in it was at least twenty feet away.⁵⁴ Under other state legislation, if passengers embarked or debarked in small boats, the steamboat's engines were to be stopped and to remain stopped all the time while the boat was progressing to and from shore⁵⁵ except to aid the boat in reaching shore or to preserve the steamboat in its direction;⁵⁶ no passengers were to be placed in such boats for the purpose of landing them until the boats were completely afloat and disengaged except for the painter.⁵⁷ On leaving or reaching shore at night, the boat was to notify that fact to the steamboat by signalling with its horn.⁵⁸ The wilful overloading of any vessel with goods or passengers in such manner as to cause it to capsize and endanger the life of any person⁵⁹ or the creation of such an excess head of steam, by the shipmaster or engineer of a steamboat, as to cause the boilers to explode⁶⁰ were both made misdemeanors subject to prosecution and punishment by the state.

Nor was state activity by any means confined to safety regulations. The relations of those in charge of the vessel with the passengers, whether by way of provisions in the contract of carriage, accommodations required to be furnished, or what not, was regulated by many states and in many respects.

The minimum requisite allotment per passenger of space and provisions was prescribed and vessels bound for the state were forbidden to bring more passengers than could be furnished with the statutory accommodations.⁶¹ The availability of statutory remedies for the enforcement of executory agreements with immigrants respecting payment of passage money was conditioned on compliance with the state defined standards as to accommodations⁶² and further on the provision of medical care during the voyage, if the vessel carried more than a stated number of persons.⁶³ Such legislation is especially interesting as constituting a command addressed to those in charge of the vessel by the state respecting their conduct beyond its borders in anticipation of entry, conditioning the right to come within the state upon obedience to its mandate. It was legislation

⁵³N.J. COMP. PUB. LAWS (1833) 179 (Feb. 28, 1828).

⁵⁴*Ibid.*

⁵⁵1 N.Y. REV. STAT. (1827-28) 683.

⁵⁶*Id.* at 684.

⁵⁷*Id.* at 683.

⁵⁸*Id.* at 684.

⁵⁹*Id.* at 694.

⁶⁰*Ibid.*

⁶¹DEL. REV. STAT. (1829) 298 (Jan. 24, 1797)

⁶²2 DIG. LA. ACTS (1804-27) 297 (Mar. 20, 1818).

⁶³*Ibid.*

distinctly relating, indeed necessarily confined in operation, to intercourse with other states and foreign nations and which was frankly calculated to act extraterritorially. In specific recognition of this, it was occasionally provided that copies of the statute should be sent to American consuls at the ports where immigrants were accustomed to embark.⁶⁴

The shipmaster was directed to give every immigrant or other passenger at the outset of the voyage a bill of lading for such of the passenger's effects as the latter had no need for on the voyage, and to stow such effects in a place not open to access, with liability imposed as to them but not as to baggage carried by passengers with them between decks.⁶⁵ On payment of passage money and port charges, every passenger together with his personal effects as listed should be discharged or the ship be suable for conversion or false imprisonment.⁶⁶ Unless passage money was paid in advance, the captain might hold the passenger's effects as security for the fare and, on certain conditions, sell it to reimburse himself.⁶⁷ An inventory of the goods of passengers dying in the course of the voyage must be delivered by the master of the vessel to designated officials of the enacting state.⁶⁸

A type of contract now obsolete but much in vogue when the country was new was that under which impecunious immigrants agreed with ship captains or others having charge of vessels to become bound servants on arrival in America, that is, to permit a sale of their future services for a term of years, the proceeds to go to the carrier as passage money. Such contracts, while well adapted to hastening the peopling of the country, were subject to at least two quite dissimilar abuses. On the one hand, the circumstances of those compelled to resort to this device to finance their passage made it possible for carriers to extort harsh and oppressive terms from them; necessitous men were no more free men then than they were a century later. On the other, the executory character of the immigrant's undertakings after he had received in full the consideration for which they were given invited him to refuse to fulfill the obligations of his indenture which meant, in turn, that the value of such contracts generally was reduced, ship captains would find fewer and lower bidders for the services of immigrants, and the usefulness of this device as a means for encouraging immigration would be correspondingly impaired. To prevent these

⁶⁴*Id.* at 300.

⁶⁵ PA. LAWS (1817-21) 29 (Feb. 7, 1818).

⁶⁶*Ibid.*

⁶⁷*Ibid.*

⁶⁸ MD. LAWS 1692-1839 (Dorsey) 684 (Dec. 1817); 7 PA. LAWS (1817-21) 29 (Feb. 7, 1818).

untoward consequences, the states undertook the regulation of the terms and enforcement of such contracts.

Some states conditioned the introduction of indentured servants on prior official approval of the terms and conditions of the contract.⁶⁹ In others, guardians speaking the native tongue of the redemptioner were to be appointed to board the incoming vessel, inquire into the treatment he had received, and look after his interests;⁷⁰ cruelty to or mistreatment of the immigrant was to be reported by the guardian to the state or federal authorities, whose advice should be taken how to proceed against shipmasters guilty of such conduct.⁷¹ The appointed guardians must approve the terms of the contracts of indenture,⁷² whose specific performance was denied in the absence of such approval.⁷³ Under another state's legislation, all indentures of immigrants must be registered⁷⁴ and the maximum period of service for which they could be bound out was fixed, the indenture being void as to any excess.⁷⁵ Contracts for service beyond the borders of the state⁷⁶ or which would separate husband and wife⁷⁷ were not to be made.

If redemptioners refused upon arrival to fulfill their obligations under the contract for passage, they were to be indentured by local authorities within the state in conformity with the agreement.⁷⁸ Any dispute with the master or vessel regarding the terms and conditions of the contract were to be passed upon and determined, it was sometimes provided, by the authorities of the state to which they were brought.⁷⁹ They might be put on board ship after arrival until the price of their passage was paid or until they should be bound out;⁸⁰ but some states provided a maximum period during which they could be so detained,⁸¹ with the further provision that if they were kept beyond that time or were mistreated at any time while aboard, they were to be placed on shore at the ship captain's expense,⁸²

⁶⁹See, *e.g.*, DEL. REV. STAT. (1829) 305 (Feb. 12, 1829).

⁷⁰2 DIG. LA. ACTS (1804-27) 297 (Mar. 20, 1818); 2 PA. LAWS (1780-91) 328 (Apr. 8, 1785).

⁷¹2 DIG. LA. ACTS (1804-27) 297 (Mar. 10, 1818).

⁷²2 DIG. LA. ACTS (1804-27) 297 (Mar. 10, 1818); *cf.* 7 PA. LAWS (1817-21) 29 (mayor of Philadelphia or register of German passengers, Feb. 7, 1818).

⁷³2 DIG. LA. ACTS (1804-27) 297 (Mar. 20, 1818).

⁷⁴1 MD. LAWS 1692-1839 (Dorsey) 684 (Dec. 1817); 2 PA. LAWS (1780-91) 328 (Apr. 1785).

⁷⁵1 MD. LAWS 1692-1839 (Dorsey) 684 (Dec. 1817); 1 VA. REV. CODE (1819) 418 (Dec. 16, 1792).

⁷⁶7 PA. LAWS (1817-1821) 29 (Feb. 7, 1818).

⁷⁷*Ibid.*

⁷⁸GA. DIG. LAWS (Prince 1819) 431 (Feb. 6, 1796).

⁷⁹1 N.C. REV. LAWS (1821) 152 (1741).

⁸⁰2 DIG. LA. ACTS (1804-27) 297 (Mar. 20, 1818); 7 PA. LAWS (1817-21) 29 (Feb. 7, 1818).

⁸¹1 MD. LAWS 1692-1839 (Dorsey) 684 (30 days, Dec. 1817).

⁸²*Ibid.*

while others directed that detention for the first thirty days should be at the expense of the captain and all after that at the passenger's expense.⁸³ Names of redemptioners dying on the vessel or in port should be reported to the persons officially charged with protecting their interests.⁸⁴

Occasionally a state required the burial on land of persons dying at sea and prescribed penalties for non-compliance.⁸⁵

The state's role as arbiter of disputes between carriers and consignors or consignees was undisputed. Rules were prescribed and machinery provided by their legislatures for the adjustment of controversies between the parties to the contract of carriage. For example, the matter of survey and valuation of cargoes, in the event of a claim of damage upon arrival, was commonly covered by state legislation constituting port or harbor authorities for particular localities.⁸⁶ Persons in charge of vessels operating along certain stretches of interstate boundary rivers were required to issue bills of lading for goods received for carriage;⁸⁷ perhaps these provisions may have been intended to apply only to dealings with residents of the enacting state but the failure of the statutes so to state leaves the matter in doubt. Occasionally local authorities were constituted to examine the condition of any vessel within the county, its cargo or lading⁸⁸ or to attend at the lading and unlading of any vessel, to survey, note, and record the condition of the cargo and the nature of its stowage.⁸⁹

The contingency of destruction of the goods and the allocation of the resultant loss was variously dealt with by the several state legislatures according to their best lights. By some, a limitation of the liability of owners or charterers, to the value of their interest in the ship or its freight, when goods were embezzled, lost, or destroyed by the mariners without their connivance, was enacted, as a corrective to contrary judicial holdings

⁸³PA. LAWS (1817-21) 29 (Feb. 7, 1818).

⁸⁴*Ibid.*

⁸⁵See, e.g., 2 VA. REV. CODE (1819) 298 (1785).

⁸⁶ALA. DIG. LAWS (Toulmin 1823) 196 (Blakeley, Dec. 20, 1820); *id.* 854 (Mobile, Nov. 21, 1818); KY. DIG. STAT. LAWS (Moorhead & Brown, 1834) title 140 (Feb. 6, 1819); *ibid.* (Jan. 12, 1825); 1 DIG. LA. ACTS (1804-27) 516 (Mar. 31, 1805).

⁸⁷GA. DIG. LAWS (Prince 1819) 51 (Savannah River from Augusta to the headwaters, Dec. 4, 1815).

⁸⁸KY. DIG. STAT. LAWS (Moorhead & Brown 1834) title 140 (Feb. 6, 1819); *cf.* N.J. REV. LAWS (1820) 66, 73 (charters of Perth Amboy and Burlington respectively, both authorizing the municipality to regulate "the inspection of vessels, passengers, and goods," Dec. 21, 1784).

⁸⁹KY. DIG. STAT. LAWS (Moorhead & Brown 1834) title 140 (Feb. 6, 1819); *cf.* 1 DIG. LA. ACTS (1804-27) 516 (Mar. 31, 1805); MISS. REV. CODE (1824) 630 (authority to direct the receiving and discharge of cargoes, Jan. 26, 1821); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 14 (charter of Georgetown, empowering the city to regulate "the landing and weighing of goods," 1805).

reached in the absence of statute.⁹⁰ The doctrine of general average was adopted to govern the situation where goods of one or some of several affreighters were thus lost.⁹¹ Conversely, the vicarious liability of stage line owners for passenger injuries resulting from improper driving was sometimes affirmed by express legislation.⁹² Again, it was provided that the crew should be liable for any loss of cargo or tackle by their neglect or default during the voyage.⁹³ The statutory liability of the captain for passengers' effects carried on a bill of lading, as distinguished from the passenger's own risk-bearing as to baggage carried with him, has been noted.⁹⁴

In the event of non-payment of fees by the master of an extrastate vessel, Virginia required that the supercargo or the consignee should be liable for the pilotage fees.⁹⁵

It took no constitutional lawyer to tell the states that they could not legislate away the perils of the sea. Protection against them must be sought in the ancient institution of marine insurance and in the liability of ship-owners and others for loss. Protection of insurers was the *motif* of a group of state statutes, which undertook to effect it by attaching the sanctions of the criminal law to various acts done with intent to defraud them by persons in charge of or connected with vessels—the wilful burning, casting away, or destruction of the ship,⁹⁶ the fitting it out with the intent that it should be wilfully cast away,⁹⁷ the making out of a false invoice or bill of parcels,⁹⁸ or the making out or exhibition of a false affidavit or protest as to the cargo.⁹⁹ As a part of her legislation outlawing the slave trade, Massachusetts enacted that all policies of marine insurance taken out in Massachusetts companies should be void if the insured vessel was employed in that trade.¹⁰⁰

Sharply contrasted with the burgeoning heterogeneity of state regulation were the instances of Congressional legislation. The meagre materials appear to relate entirely to voyages abroad and even as to that are

⁹⁰1 ME. REV. LAWS (1821) 92; Mass. Sess. Laws Jan. 1819, p.193.

⁹¹*Ibid.*

⁹²N.J. COMP. PUB. LAWS (1833) 181 (Feb. 28, 1828); 1 N.Y. REV. STAT. (1827-28) 696.

⁹³1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 53 (Oct. 1, 1804).

⁹⁴*Supra* note 65.

⁹⁵2 VA. REV. CODE (1819) 126 (1801).

⁹⁶CONN. PUB. STAT. (1824) 99; 1 ME. REV. LAWS (1821) 87; 3 MASS. LAWS (1780-1807) 151 (Mar. 8, 1803); *cf.* 2 N.Y. REV. STAT. (1827-28) 667 (burning); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 37 (casting away, etc., with intent to cause injury to owners or merchants, 1701).

⁹⁷1 ME. REV. LAWS (1821) 87; 3 MASS. LAWS (1780-1807) 151 (Mar. 8, 1803).

⁹⁸*Ibid.*

⁹⁹1 REV. LAWS ME. (1821) 88; 3 MASS. LAWS (1780-1807) 151 (Mar. 8, 1803).

¹⁰⁰1 MASS. LAWS (1780-1807) 407 (Mar. 26, 1788).

fragmentary and unsystematic. Nothing was provided as to land carriage, nothing as to safety regulations, nothing as to redemptioners' contracts for passage. Consistent with and supplemental to similar state legislation already discussed¹⁰¹ were federal acts which, as to passenger vessels plying between the United States and foreign countries, required that no ship should carry in excess of a certain number of passengers depending on its tonnage,¹⁰² prescribed a minimum allowance of water and provisions per passenger,¹⁰³ and commanded persons in charge of vessels to keep for delivery to the appropriate port collectors manifests of the passengers, describing them, setting forth their several origins, and indicating any who had died during the voyage.¹⁰⁴ Again, in connection with its definition of the duties of collectors of customs, Congress made provision for the unloading of ships in case of obstructions by ice but only by authorizing the collector of any district to permit it in ports of his district other than the port of entry.¹⁰⁵ Following the controversy with Great Britain over impressment of seamen, the federal government provided that no foreign seaman might be admitted as a passenger aboard an American ship without displaying a written certificate from a proper official in his home country.¹⁰⁶ Whether these latter two enactments impinged on commerce regulation or not would not seem to be greatly important; for they were at least as connected with other special heads of federal competence, the former with the control over revenue and customs, the latter with the direction of foreign affairs. Even more clearly comprised under a separate grant was the act by which Congress made it a crime subject to capital punishment to cast away a ship upon the high seas;¹⁰⁷ this, if anything ever was, was plainly an exercise of the power "to define and punish . . . felonies committed on the high seas."¹⁰⁸ And that is the extent of the federal legislation even remotely relevant.

III. EMPLOYEES AND INDEPENDENT CONTRACTORS

While contemporary regulations as to the personnel of the transportation services ordinarily centered on matters other than their qualifications, some activity in that connection was undertaken by the states. Ferry boat operators were required to meet the vague general standard of being

¹⁰¹See statutes cited *supra* notes 61, 62.

¹⁰²3 STAT. 488 (1819).

¹⁰³*Ibid.*

¹⁰⁴*Id.* at 489.

¹⁰⁵1 STAT. 188 (1791).

¹⁰⁶2 STAT. 809 (1813).

¹⁰⁷2 STAT. 290 (1804).

¹⁰⁸U.S. CONST. Art. I, § 8, clause 10.

competent;¹⁰⁹ and there was in the typical scheme set up for the licensing of pilots¹¹⁰ a tolerable assurance of their being qualified for their job. Scattered instances also exist in the legislation of the various states requiring all boat owners engaged in carrying for hire on a boundary river to obtain a license from the state and penalizing a failure to do so;¹¹¹ granting to canal and navigation improvement companies the sole privilege of running or licensing the running of particular types of craft such as steamboats;¹¹² forbidding negroes to serve as pilots¹¹³ and similarly excluding non-residents from engaging in that occupation,¹¹⁴ with an occasional proviso in favor of residents of a named contiguous state.¹¹⁵ In the operation of stage lines only sober and careful drivers were to be employed;¹¹⁶ drunken drivers were made liable to punishment as misdemeanants¹¹⁷ and driving while intoxicated was by state legislation declared to be a mandatory ground for discharge.¹¹⁸

The vast bulk of the legislation, however, as has already been stated, dealt with matters other than the selection of suitable and responsible agents to carry on the enterprise. The completeness of the jurisdiction which the states assumed to exercise over persons engaged in the carrying trade is vividly illustrated in a temporary act of Louisiana, in 1814, providing for the enrollment of all seafaring men in the state other than those in the service of the United States.¹¹⁹ Occasionally a state would delegate this whole broad authority to municipalities¹²⁰ but such instances were com-

¹⁰⁹CONN. PUB. STAT. (1824) 166; DEL. REV. STAT. (1829) 602 (Jan. 21, 1803); Ill. Laws 1819, p.28; INDIANA TERR. LAWS 1801-1809 (Philbrick) 354 (Sept. 17, 1807); Ind. Acts 1817-18, p.294; 2 ME. REV. LAWS (1821) 768; 2 MASS. LAWS (1780-1807) 749 (Feb. 14, 1797); 1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 80 (July 9, 1806); *id.* 699 (Dec. 8, 1820); N.J. REV. LAWS (1820) 408 (Feb. 6, 1799); Ohio Laws 1820, p.171; R.I. REV. LAWS (1822) 410; 2 VA. REV. CODE (1819) c.237 (Jan. 30, 1819).

¹¹⁰See the authorities cited in the discussion *infra* pages 359-364; and *cf.* 2 N.C. REV. LAWS (1821) 929 (commissioners of navigation authorized to disqualify pilots on finding of improper conduct, 1800); VA. REV. CODE (Supp. 1833) 389 (Mar. 5, 1824).

¹¹¹2 VA. REV. CODE (1819) 302 (Dec. 9, 1793).

¹¹²1 DIG. LA. ACTS (1804-27) 561 (improved portion of Red River).

¹¹³2 N.C. REV. LAWS (1821) 1235 (1812); 2 VA. REV. CODE (1819) 128 (1801).

¹¹⁴2 VA. REV. CODE (1819) 126 (1794).

¹¹⁵*Ibid* (residents of Maryland, 1800).

¹¹⁶N.J. COMP. PUB. LAWS (1833) 181 (Feb. 25, 1828); 1 N.Y. REV. STAT. (1827-1828) 695.

¹¹⁷N.J. COMP. PUB. LAWS (1833) 181 (Feb. 25, 1828).

¹¹⁸1 N.Y. REV. STAT. (1827-28) 695.

¹¹⁹La. Sess. Acts 1814, p.14.

¹²⁰*Cf.* N.J. REV. LAWS (1820) 66, 73 (charters of Perth Amboy and Burlington, respectively, giving those cities the power to regulate "merchants, watermen, and seamen," Dec. 21, 1784); 3 PA. LAWS (1791-1802) 274 (Philadelphia county commissioners authorized to regulate carters and boatmen frequenting public wharves and landings in Northern Liberties, Apr. 4, 1796); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 21 (charter of Beaufort, confiding to it "the regulation of seamen," 1803); *id.* 36 (charter of Charleston, same, 1783); *id.* 140 (charter of Georgetown, same, 1805).

paratively rare, with the state legislatures commonly themselves undertaking the prescription of the applicable rules.

The effort to prevent runaway slaves from escaping was at the basis of some of the legislation respecting the composition of crews engaged in traffic between the states, for example, that subjecting to severe penalties any master of a vessel who should take a colored boathand out of the state unless after exhibition of an official certificate of freedom or consent by the master of the slave.¹²¹ It will be noted that this regulation not merely included but was actually confined to the conduct of interstate voyages, its patent purpose being to prevent (except under strict limitations) any travel to other states by the class of persons against whom its provisions were directed.

Similarly connected with the "peculiar institution" was another class of state regulations, which dealt with employee qualifications and is of interest primarily because it was in form an exemption from regulation. Restrictions on the movement or migration of colored persons were widespread and sweeping, particularly in the southern states; but one of the very rare exceptions from their operation, in some of the states where they were imposed, relieved free negroes and mulattoes employed as carriers or mariners from their application,¹²² thus permitting such persons to ply their trade despite the general prohibition. It is an interesting speculation whether the exemption was regarded as an act of grace to conciliate the demands of the transportation industry or as flowing from a defect of state power engendered by the commerce clause, the privileges and immunities clause, or some other provision of the Constitution. It is to be noted that the exemption was qualified under some statutes by the proviso that, if a colored seaman remained within the state more than a stated number of days after the departure of his vessel, he should lose his immunity and be proceeded against in the same manner as other free persons of color illegally coming within the state,¹²³ which rather suggests that his preferred position did not arise from any claims he might urge on the ground of freedom or of citizenship in one of the free states. Of rather similar tenor was the proviso, in the general laws against permitting servants or slaves to come or remain aboard ship, which allowed shipmasters to hire such persons from resident owners for work on board.¹²⁴

¹²¹KY. DIG. STAT. LAWS (Moorhead & Brown, 1834) title 31 (Jan. 16, 1798).

¹²²DEL. REV. STAT. (1829) 410 (Jan. 28, 1811); GA. DIG. LAWS (Prince 1819) 465 (Dec. 19, 1818); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 253 (also slaves, 1800); 1 VA. REV. CODE (1819) 466 (1793).

¹²³GA. DIG. LAWS (Prince 1819) 465 (Dec. 19, 1818).

¹²⁴1 MD. LAWS 1692-1839 (Dorsey) 97 (Oct. 1753).

Whatever the considerations that led to these relaxations of the race laws, they were not sufficiently powerful to induce equality of treatment for those who did and those who did not employ colored seamen. Without excluding either the vessel or the hands because of the presence of colored crew members, it was required that such vessels must, merely on account of that fact, perform quarantine for a substantial time after arrival in the waters of the state;¹²⁵ that during the period of quarantine no negro might go aboard;¹²⁶ that the master must report the name and description of every colored seaman connected with the ship and give bond to secure the departure with the vessel of all such persons;¹²⁷ and that no colored seaman might come or remain ashore at night.¹²⁸ The application of these provisions to vessels engaged in interstate and foreign voyages, perhaps even exclusively to those so engaged, was plainly indicated by the language of the legislation, speaking as it did of vessels "arriving" in the waters of the state. That conclusion becomes compelling in the light of an exception, like that in the Georgia statute, providing that the restriction should apply to all vessels except those coming from South Carolina.¹²⁹ From the standpoint of statutory construction the exception is interesting as a demonstration that other vessels of the same generic category, *i. e.*, those coming from other states, were within the statutory ban; from the constitutional standpoint it is still more interesting as indicating a legislative understanding that the states not only might legislate with respect to vessels arriving from out of the state but furthermore might differentiate between sister states, extending to certain of them favors withheld from others.

Conversely the abolition statutes of the free states occasionally expressly exempted from their operation slaves employed as seamen on vessels with home ports in other states, provided they did not remain beyond a stated period,¹³⁰ with the exception that resident slaves employed abroad as seamen and not brought back by their owners should be entitled to have the benefit of the abolition act extended to them as fully as all other resident slaves.¹³¹

The states were concerned to prevent desertion. State authorities were empowered to take up sailors absenting themselves from their vessels more than twenty four hours¹³² at the expense of the master, who was, however,

¹²⁵GA. DIG. LAWS 1820-1829 (Foster) 314 (Dec. 22, 1829).

¹²⁶*Ibid.*

¹²⁷GA. DIG. LAWS 1820-1829 (Foster) 312 (Dec. 20, 1826); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 253 (1800).

¹²⁸GA. DIG. LAWS 1820-1829 (Foster) 312 (Dec. 20, 1826).

¹²⁹*Ibid.*

¹³⁰See, *e.g.*, 1 PA. LAWS (1700-1780) 492 (six months, Mar. 1, 1780).

¹³¹*Ibid.* (to be registered within five years).

¹³²GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766); *cf.* VA. REV. CODE (1819) 131 (foreign seamen and apprentices, Jan. 9, 1805).

authorized to recoup it from the sailor's wages;¹³³ and any person was authorized to apprehend deserting seamen and deliver them to the authorities who might in turn deliver them to the master.¹³⁴ Masters were directed to report desertions to the municipal authorities who should then by appropriate advertisement notify others of the facts reported.¹³⁵ Any one knowingly entertaining a deserter from a merchant vessel¹³⁶ or, more inclusively, any one entertaining in his house a sailor, without the consent of the master,¹³⁷ was subject to fine. Masters were to give certificates of discharge to sailors upon performance of the contract¹³⁸ and no master should hire a sailor claiming discharge from another vessel unless the certificate were exhibited¹³⁹ nor should any ferryman venture, under penalty of a fine, to transport any seaman not possessing discharge papers.¹⁴⁰ The implications of this legislation deserve comment. Its practical effect was to make sailors a separate community. In so doing, it curtailed, for one thing, the transportation of persons across boundary rivers insofar as it dealt with the activities of ferrymen. It dictated one of the conditions on which a contract for service as a seaman, even in an interstate or foreign voyage, might be formed, in requiring presentment of a certificate of discharge. Correspondingly it assumed to regulate the circumstances of the termination of such contracts in the requirement that discharge papers be given. Finally, it undertook, in the provisions as to reimbursement of the costs involved in taking up the sailor, to control the terms of the contract of employment by the creation of a right which would almost certainly be effective only beyond the bounds of the state, since, under the prevailing concept that freight was the mother of wages, no wages would be due until termination of the voyage and which, moreover, might well annul a claim for payment for strictly extrastate services, since very possibly the expenses might exceed the wages attributable to the time spent in the state. That is to say, it assumed to modify the wage provisions of extrastate contracts for service in interstate or foreign shipping by creating a right which could be asserted only outside the state to a setoff against claims for services performed outside the state.

¹³³GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766).

¹³⁴2 S.C. DIG. PUB. STAT. LAWS (Brevard) 198 (1751).

¹³⁵2 DIG. LA. ACRS (1804-27) 368 (Jan. 11, 1822).

¹³⁶*Ibid.*

¹³⁷GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766).

¹³⁸GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766); 2 DIG. LA. ACRS (1804-27) 369 (Jan. 11, 1822); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 198 (1751).

¹³⁹GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 198 (1751); *cf.* 2 DIG. LA. ACRS (1804-27) 368 (sailor either to present certificates of discharge or to be detained pending inquiry of other vessels whether he was wanted as a deserter, Jan. 11, 1822).

¹⁴⁰GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 199 (1751).

A kindred but less sweeping form of state legislation undertook to enforce the performance of domestic contracts to serve as member of a crew. One so contracting and receiving part of the consideration expressed in writing, who failed to perform the stipulated service, should be taken up, it was provided, on application of the promisee and delivered for service;¹⁴¹ he might be held aboard the vessel to perform the contract and the expense of taking him up might be deducted from his wages. The provisions were specifically made applicable alike where the contract was for navigation to an intrastate port and where it contemplated navigation to an extrastate port.¹⁴²

In the constitutional problems presented, these statutes for the enforcement of sailors' contracts were essentially like those designed to prevent desertion, tempered by the circumstance that they extended only to contracts made within the state but perhaps aggravated by the explicit reference to extrastate services. Both types represented evident assumptions of jurisdiction by the enacting states over the relations of employee and employer under agreements for service in the business of interstate carriage. It was declared to be the policy of the state that contracts to serve as boatmen should be fulfilled according to their true intent and meaning.¹⁴³ Boatmen neglecting their duty, quitting their boat, or misbehaving might on conviction either be ordered discharged forthwith with a forfeiture of wages, a fine, or both or be put under bond to perform their duty for the rest of the engagement.¹⁴⁴ Moreover, as to contracts for voyages in excess of a specified distance or time (which, it is to be observed, were so fixed that they would almost necessarily involve an extrastate voyage) provision was made for registry with state officials¹⁴⁵ and, for desertion before completion of a registered contract, sailors might be punished by imprisonment.¹⁴⁶

In the provisions discussed above which required shipmasters to give bond for the removal of colored crew members, subjected such of the latter as stayed beyond a designated period after their ship sailed to severe penalties, and otherwise applied the state's authority with particular attention to seeing that, as to persons of that description, the personnel of the crew should remain intact, the legislature was animated by a different

¹⁴¹KY. DIG. STAT. LAWS (Moorhead & Brown, 1834) title 31 (Dec. 21, 1794).

¹⁴²*Ibid.*

¹⁴³1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 53 (Oct. 1, 1804).

¹⁴⁴*Ibid.*

¹⁴⁵1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 249 (journeys of over 500 miles or for longer than one month, Oct. 30, 1810).

¹⁴⁶*Ibid.*

thought. Such regulations aimed less at insuring that the ship did not lose her complement of hands than at seeing to it that the land did not receive unwanted accessions from among them. A like purpose was manifested in legislation requiring that a master who introduced sick, lame, or maimed seamen should maintain them during the vessel's stay and take them out when it left or give bond to prevent their becoming public charges;¹⁴⁷ if their condition became such that they could not be moved, he was to pay them whatever wages were due and no more.¹⁴⁸

"To the end that no ship or vessel . . . be detained from proceeding in the intended voyage,"¹⁴⁹ the amount of credit which might be extended to mariners without the master's consent was drastically limited.¹⁵⁰ If creditors permitted sailors to contract a greater debt, the excess beyond the statutory amount was declared void¹⁵¹ or, under a somewhat more lenient form of statute which required that the debtor be permitted to depart upon tender of the statutory amount,¹⁵² continued in a most shadowy form if at all.

If the time of sailing was stated in the sailor's contract, he might be docked a day's pay for each hour's tardiness in reporting to the ship.¹⁵³ Creditors' claims against sailors were not to be allowed to hinder the commencement of a voyage if an order for specific performance of a contract for service were obtained.¹⁵⁴ Should any creditor antedate the note or similar obligation of a sailor with intent to stop his proceeding on a voyage, the note should be void and in addition the creditor should be fined.¹⁵⁵ This experiment in class legislation for seamen, traditionally a thriftless race, in an age when body execution was a common mode of enforcing landlubbers' debts, was no outgrowth of humanitarian interest in sailor folk. Rather it was a concession by the state to the simple imperative of navigation that the crew must go when the ship must go.

The special temptations presented to a seafaring man by life ashore were legislatively noticed, however, in provisions limiting the amount of

¹⁴⁷² S.C. DIG. PUB. STAT. LAWS (Brevard) 197 (1712); *cf.* 2 VA. REV. CODE (1819) 298 (putting ashore diseased or disabled seamen, not entitled to discharge under contract, subjected to penalty, 1748).

¹⁴⁸² S.C. DIG. PUB. STAT. LAWS (Brevard) 197 (1712).

¹⁴⁹ See DEL. REV. STAT. (1829) 399 (1741).

¹⁵⁰ DEL. REV. STAT. (1829) 399 (1741); GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766).

¹⁵¹ GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766).

¹⁵² DEL. REV. STAT. (1829) 399 (1741).

¹⁵³¹ LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 249 (Oct. 30, 1810).

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

grog which a tavern keeper might in any given day sell such a customer and prohibiting such sales altogether after a certain hour in the evening,¹⁵⁶ or where the ship master had given instructions not to sell to the crew¹⁵⁷ and those totally avoiding all credits extended to seamen for liquor¹⁵⁸ and imposing penalties for selling it to them or entertaining them without their master's consent.¹⁵⁹

Should the vessel owner mistreat any of the crew or fail to furnish necessary provisions, it was sometimes provided that he forthwith became liable to pay any injured sailor an amount fixed by the court as a penalty while the sailor might claim a discharge from his contract though the contemplated voyage had not been completed.¹⁶⁰ Owners, because they were under a duty to furnish requisite provisions, could not sell provisions to the crew¹⁶¹ nor could they charge them in excess of a reasonable rate for liquor supplied them.¹⁶² The right when conferred to take up deserting seamen and deliver them to the ship was qualified by a proviso exempting those who had suffered ill-treatment aboard.¹⁶³

State activity looking to the care and protection of seamen is exemplified by statutes for the erection and maintenance of marine hospitals. This characteristically involved conjoint state and federal action, because of the need to raise funds to support such projects and the usual device hit upon for that purpose. Typically recourse was had to the levy of tonnage duties. But, under express Constitutional provision,¹⁶⁴ such duties might not be imposed by a state unless Congress assented. Accordingly, the financing of the provisions for seamen's hospitalization often involved federal concurrence, which was freely sought¹⁶⁵ and freely given.¹⁶⁶ Aside from this fiscal complication it may be assumed that the states felt that they could independently establish regulations respecting medical care in

¹⁵⁶GA. DIG. LAWS (Prince 1819) 419 (Mar. 6, 1766); 1 S.C. DIG. PUB. STAT. LAWS (Brevard) 415 (unless with shipmasters' consent, 1695); *cf.* 2 *id.* 197 (1751).

¹⁵⁷2 N.C. REV. LAWS (1821) 868 (1798).

¹⁵⁸2 VA. REV. CODE (1819) 279 (1748).

¹⁵⁹*Ibid.*

¹⁶⁰1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 53 (Oct. 1, 1804); *id.* 249 (Oct. 30, 1810).

¹⁶¹1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 249 (Oct. 30, 1810).

¹⁶²*Ibid.* The maximum allowed is, however, hardly calculated to impress one in a less robust era as unduly restrictive, being ten per cent of the wages for the voyage.

¹⁶³2 VA. REV. CODE (1819) 131 (Jan. 9, 1805).

¹⁶⁴U.S. CONST. Art. I, § 10, clause 3.

¹⁶⁵See, *e.g.*, ALA. DIG. LAWS (Toulmin 1823) 876 (Alabama congressmen instructed to seek permission to lay tonnage tax for seamen's hospital fund at Mobile and Blakeley, Dec. 31, 1822).

¹⁶⁶See, *e.g.*, 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 52 (reciting state and Congressional assent to tonnage tax for Charleston marine hospital, 1806).

this situation for legislation which relied on other sources for the requisite revenue was adopted without invoking the federal blessing. For example, where the benefits of the hospital were to accrue to seamen connected with the shipping of other states in such measure that it was felt they might be interested in its maintenance, their legislatures were asked to contribute funds for that purpose;¹⁶⁷ and at least two instances are on record where such a contribution was made by a state having intimate commercial relations with the port where the hospital was established although geographically distant.¹⁶⁸ There was assessed against every vessel using a particular port a stated amount for each member of its complement, officers and crew, to form a fund to be devoted to a marine hospital.¹⁶⁹ In Rhode Island, the legislature directed shipmasters to withhold the wages of hospitalized seamen to answer for the charges owing the town for their care.¹⁷⁰

In the disposition of the half-pilotage fees paid in by way of penalty for violation of the duty to take on a pilot¹⁷¹ there was an outstanding instance of state concern with the care and welfare of those engaged in that phase of transportation activity. Ordinarily these were directed to be paid in to a fund for the relief of "decayed and distressed pilots" and for pilots' widows and orphans.¹⁷² The Delaware statute afforded a particularly interesting example of interstate co-operation in this kind of social security legislation, since it directed payment of the penalty to a Pennsylvania association which apparently had as its beneficiaries those engaged in the pilotage of Delaware River and Bay whether for Pennsylvania or for Delaware ports.¹⁷³ Another instance of regulation motivated by regard for the well-being of those employed in this phase of navigation is found in legislation requiring persons conducting houses of entertainment at pilot stations to be specially licensed for that purpose.¹⁷⁴

¹⁶⁷See 1 DIG. LA. ACTS (1804-27) 525 (New Orleans Charity Hospital, Mar. 7, 1814).

¹⁶⁸1 DIG. LA. ACTS (1804-27) 528 (accepting subscription by Pennsylvania to New Orleans Charity Hospital, Feb. 22, 1817); 1 TENN. LAWS (Scott 1820) 861 (granting a sum of money to the Natchez Hospital, Nov. 1, 1805).

¹⁶⁹2 N.C. REV. STAT. (1821) 416 (1817); *cf.* 1 N.Y. REV. STAT. (1827-28) 445, 446 (master to pay stated sums for officers, crew, and passengers for the purpose named, with the privilege of reimbursement).

¹⁷⁰R.I. REV. LAWS (1822) 264.

¹⁷¹Instances of such provisions are to be found in the statutes cited *infra* note 185.

¹⁷²See, *e.g.*, DEL. REV. STAT. (1829) 433 (Feb. 5, 1819); *id.* 434 (Jan. 21, 1825); 4 PA. LAWS (1802-08) 67 (Mar. 29, 1803); *cf.* 1 PA. LAWS (1700-80) 306 (act for incorporating a society for the relief of poor, aged, and infirm masters of ships, their widows, and children, Feb. 24, 1770).

¹⁷³DEL. REV. STAT. (1829) 433 (Feb. 5, 1819); *id.* 434 (Jan. 21, 1825); *cf.* 2 PA. LAWS (1780-91) 512 (charter of Society, Sept. 29, 1789).

¹⁷⁴1 DIG. LA. ACTS (1804-27) 519 (Mar. 1, 1826).

Steamboat captains, as well on vessels making interstate voyages as on those operating wholly within the state, were by the New Jersey legislature made *ex officio* tax collectors, and required to make periodic reports to tax officials and account for sums received in that capacity, under penalty of fine for neglect or refusal to act.¹⁷⁵

It so happened that the general navigating skill which qualified master and crew to sail across the ocean or down the whole length of the Ohio and the Mississippi was least helpful in the vessel's management during precisely those parts of the journey where territorial notions of sovereignty yielded most support for state controls, namely, in entering and leaving the port. There the special skill and local familiarity of pilots were called for. In ordinary course these qualities were met with mostly in residents and their presence could best be ascertained by residents. Under the circumstances it was a natural development for the states to exercise control over the qualifications and conduct of pilots and consequently, in considerable measure, over those parts of the voyage which would normally be performed while ships were in the pilots' charge.

Great activity was displayed in this branch of legislation with virtually all the states which had a substantial waterborne traffic and some not usually thought of in that connection enacting pilotage legislation for their ports and coasts. Sometimes the simple device of confiding the regulation of the subject to local authorities was preferred;¹⁷⁶ this mode of treating the matter as a municipal regulation hardly susceptible of general legislative prescription appealed to Congress sitting as a legislature for the District of Columbia.¹⁷⁷ In other states the legislature itself provided a minutely detailed and particularized body of rules, sometimes for designated localities,¹⁷⁸ sometimes of statewide application,¹⁷⁹ leaving to

¹⁷⁵N.J. REV. LAWS (1820) 657 (Feb. 11, 1819). While the subject of state taxation of interstate commerce is alien to the matters with which this article is concerned, the tax in question deserves brief notice because of its undoubted repugnance to later notions of constitutionality. It was levied to create a fund for internal improvements by assessing a tax of two cents per mile travelled, on each passenger, for carriage within New Jersey and within any other state having a similar tax.

¹⁷⁶¹DIG. LA. ACTS (1804-27) 517 (New Orleans, Mar. 31, 1805); N.J. REV. LAWS (1820) 66 (Perth Amboy, Dec. 21, 1784); *id.* 73 (Burlington, Dec. 21, 1784); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 18 (Beaufort, 1784); *id.* 36 (Charleston, 1783); *id.* 137 (Georgetown, 1784).

¹⁷⁷³STAT. 583 (1820) (charter of Washington).

¹⁷⁸ALA. DIG. LAWS (Toulmin 1823) 854 (Nov. 21, 1818); *id.* 869 (Dec. 23, 1822); 1 MASS. LAWS (1780-1807) 100 (July 11, 1783); *id.* 259 (Nov. 23, 1785); 2 *id.* 776 (Mar. 10, 1797); 4 MASS. LAWS (1807-16) 395 (Feb. 25, 1814); N.H. COMP. LAWS (1830) 282 (June 22, 1785); *id.* 284 (Jan. 26, 1790, June 18, 1805); 1 N.C. REV. LAWS (1821) 556 (1786); *id.* 626 (1790); *id.* 695, 696 (1792); 2 N.C. REV. LAWS (1821) 961 (1801); 4 PA. LAWS (1802-08) 67 (a particularly full and detailed statute, Mar. 29, 1803); *cf.* 1 MASS. LAWS (1780-1807) 109 (relieving pilots

the administrative authority which was usually provided merely a residual discretion to issue supplementary regulations. Where the matter was thus codified, there was a prevailing pattern of regulation with only slight and rare deviations. A particular board or official was designated to pass on the qualifications of would be pilots and to issue licenses; only holders of licenses might act as pilots; they were required to prove their fitness by examination or its equivalent and to post bond against neglect or improper performance of duties; they were required to take vessels in the order that they offered themselves while, conversely, shipmasters must take pilots on the basis of priority of offering; each pilot must maintain a proper pilot boat and not infrequently had to be at least a part proprietor of it. Nor were seaports the only objects of attention in connection with pilotage regulations; similar provision was made for stretches of interstate navigable rivers where the navigation presented peculiar local difficulties,¹⁸⁰ although by and large such provisions were much less detailed.

Where, as was sometimes the case, the legislature authorized branch pilots to appoint deputies,¹⁸¹ the contracts of employment were subject to a measure of state supervision and control. Thus, for example, the duration of the contract might be fixed by statute¹⁸² and its performance be enforced by requiring as a condition of employability the presentation of a certificate of discharge from the last branch pilot by whom the deputy had been employed.¹⁸³

at Martha's Vineyard from duty of maintaining decked boats and authorizing substitution of rowboats, Oct. 24, 1783); *id.* 68 (pilotage laws repealed as to Martha's Vineyard, Mar. 16, 1784); 2 N.C. REV. LAWS (1821) 1498 (pilot examining board for Ocracoke inlet, 1819).

¹⁷⁹GA. DIG. LAWS (Prince 1819) 436 (Dec. 6, 1799); *id.* 440 (Dec. 12, 1815); 2 ME. REV. LAWS (1821) 770; 1 MD. LAWS 1692-1839 (Dorsey) 249 (Apr. 1787); *id.* 257 (Nov. 1790); *id.* 483 (Nov. 1803); 1 N.C. REV. LAWS (1821) 451 (May 17, 1783); 2 VA. REV. CODE (1819) 121 (Feb. 10, 1819); *cf.* 1 MASS. LAWS (1700-1807) 100 (governor directed to appoint pilots for named ports, also authorized to appoint for others in his discretion, July 11, 1783).

¹⁸⁰ALA. DIG. LAWS (Toulmin 1823) 705 (Muscle Shoals of Tennessee River, Dec. 13, 1819); INDIANA TERR. LAWS 1801-1809 (Philbrick) 63 (Sept. 24, 1803); *id.* 480 (Sept. 17, 1807); Ind. Private Acts 1817-18, p.11; Ind. Laws 1825, p.51 (all Indiana statutes cited relating to the Falls of the Ohio); 2 N.C. REV. LAWS (1821) 831 (Cape Fear River, 1796); VA. REV. CODE (Supp. 1833) 392 (Rappahannock County, Jan. 13, 1826).

¹⁸¹See, *e.g.*, 1 DIG. LA. ACTS (1804-27) 518 (June 7, 1806); 1 MD. LAWS 1692-1839 (Dorsey) 483 (apprentices, Nov. 1803); 1 MASS. LAWS (1780-1807) 100 (July 11, 1783); N.H. COMP. LAWS (1830) 282 (June 22, 1785); *id.* 284 (June 18, 1805).

¹⁸²1 DIG. LA. ACTS (1804-27) 519 (deputies to serve for six months, Mar. 1, 1826).

¹⁸³*Ibid.*

The regulatory feature of pilot laws came to the fore in the compulsory pilotage provisions. Apparently not all were of that type, since some statutes expressed no requirement that a pilot be employed but merely provided a qualified group and directed what should be done if the vessel availed itself of their services—thus, it would seem, leaving it optional whether a pilot should be engaged.¹⁸⁴ Indeed in a few states it was in terms provided that a captain if he chose might himself pilot his own vessel.¹⁸⁵ Other statutes, however, imposed a duty on vessels using the port to employ a pilot, under penalty of a payment of some fixed proportion (usually one half) of the usual pilotage fees if that were not done,¹⁸⁶ with perhaps a proviso diminishing or abolishing the liability for pilot fees should no pilot offer himself before the vessel reached a described part of the waters.¹⁸⁷ Shipmasters were required to report to state officials, within a stated time after arrival, the ship's name, draft, and the name of the pilot.¹⁸⁸

Various exemptions, modifications, and adaptations were incorporated. In addition to those based on tonnage and apparently meant to relieve the small craft appurtenant to the particular harbor, exemptions were stated for vessels belonging to citizens of the enacting state¹⁸⁹ or engaged in particular branches of trade which it wished to further.¹⁹⁰ As to outbound vessels, the compulsory feature was sometimes so phrased as to make it applicable to those going on extrastate journeys and to them exclusively;¹⁹¹ interstate or foreign intercourse was thus a condition precedent to the operation of the regulation. Some effort to establish a har-

¹⁸⁴See, *e.g.*, ALA. DIG. LAWS (Toulmin 1823) 854 (Nov. 21, 1818); 1 N.C. REV. LAWS (1821) 451 (May 17, 1783).

¹⁸⁵INDIANA TERR. LAWS 1801-1809 (Philbrick) 63 (Ohio River pilots, Sept. 24, 1803); *id.* 480 (Sept. 17, 1807); Ind. Private Acts 1817-18, p.11; Ind. LAWS 1825, p.51; 2 ME. REV. LAWS (1821) 770.

¹⁸⁶DEL. REV. STAT. (1829) 433 (Sept. 5, 1819); *id.* 434 (Jan. 21, 1825); GA. DIG. LAWS (Prince 1819) 436 (Dec. 6, 1799); 1 DIG. LA. ACTS (1804-27) 517 (Mar. 31, 1805); 1 MD. LAWS 1692-1839 (Dorsey) 483 (Nov. 1803); 1 MASS. LAWS (1780-1807) 100 (July 11, 1783); 2 *id.* 776 (Mar. 10, 1797); Mass. Sess. LAWS Jan. 1819, p.202; N.H. COMP. LAWS (1830) 282 (June 22, 1785); 1 N.C. REV. LAWS (1821) 482 (1784); 4 PA. LAWS (1802-08) 67 (Mar. 29, 1803); 2 VA. REV. CODE (1819) 126 (1792); VA. REV. CODE (Supp. 1833) 386 (Feb. 5, 1820).

¹⁸⁷MASS. LAWS (1780-1807) 100 (July 11, 1783); 2 *id.* 776 (Mar. 10, 1797); Mass. Sess. LAWS Jan. 1819, p.202; N.H. COMP. LAWS (1830) 282 (June 22, 1785); 4 PA. LAWS (1802-08) 67 (Mar. 29, 1803).

¹⁸⁸⁴PA. LAWS (1802-08) 67 (Mar. 29, 1803).

¹⁸⁹See DEL. REV. STAT. (1829) 433 (Feb. 5, 1819); *cf.* 2 N.C. REV. LAWS (1821) 1290 (1813).

¹⁹⁰*Cf.* Mass. Sess. LAWS May, 1819, p.266 (exempting from compulsory pilotage coasting vessels, vessels without registers, and those engaged in the plaster trade with Nova Scotia and New Brunswick).

¹⁹¹See 4 PA. LAWS (1802-08) 67 (applying requirement to all vessels for foreign ports and those of over seventy-five tons bound elsewhere than to Delaware River and Bay ports, Mar. 29, 1803).

monious system on interstate waters was manifested, as, for example, in the Maryland law providing that, except in extraordinary circumstances, Maryland pilots should not offer themselves to or conduct vessels bound for Virginia ports¹⁹² and the corollary Virginia statute that, as to vessels in distress, Maryland pilots might lawfully undertake the pilotage in Virginia waters and to Virginia ports.¹⁹³ A particularly extreme exertion of state power was found in the Pennsylvania legislation requiring outbound vessels having Pennsylvania pilots aboard to stop for twenty four hours at the Capes of the Delaware to give the pilot a chance to be taken off and assessing a substantial penalty to be forfeited to the pilot upon non-compliance;¹⁹⁴ here was an instance where a state assumed jurisdiction to direct the conduct of a vessel bound on a voyage necessarily to other states or countries, at a place outside the state boundaries, halting the voyage for a substantial time or, in case of failure to halt, imposing a penalty for non-Pennsylvania conduct.

From the way in which their legislation meshed, Congress and the state legislatures would seem to have shared a common understanding as to the matters with respect to which each with propriety could and with advantage should operate. As to the District of Columbia, Congress acted of course as the local legislatures, drawing upon standard state models in such things as the licensing of navigation improvement companies with the exclusive privilege of running packets for the carriage of passengers¹⁹⁵ and the vesting of pilot regulations in municipal authorities.¹⁹⁶ Mention has already been made of Congressional assent to the imposition of tonnage taxes by the states for the support of marine hospitals. In the same spirit Congress made provision for the relief and security of seamen. Thus, a method of proceeding against leaky and unseaworthy vessels was provided,¹⁹⁷ as was machinery for enforcing the wage agreement set forth in the shipping articles;¹⁹⁸ outward bound vessels were required to be furnished with a medicine chest;¹⁹⁹ and the supply of water and provisions to be taken aboard per member of the crew, by every ship bound across the Atlantic, was prescribed with a penalty for short allowance.²⁰⁰ On the other hand, Congress exerted itself to assure performance of their contracts by seamen. It was provided that shipping articles in writing

¹⁹²1 MD. LAWS 1692-1839 (Dorsey) 483 (Nov. 1803).

¹⁹³VA. REV. CODE (Supp. 1833) 387 (Feb. 26, 1821).

¹⁹⁴PA. LAWS (1802-08) 67 (Mar. 29, 1803).

¹⁹⁵See 2 STAT. 517 (1809).

¹⁹⁶See 3 STAT. 583 (1820) (charter of Washington).

¹⁹⁷1 STAT. 132 (1790).

¹⁹⁸*Id.* at 133.

¹⁹⁹*Id.* at 134; 2 STAT. 330 (1805) (extension to West Indianmen).

²⁰⁰1 STAT. 135 (1790).

should be executed;²⁰¹ delay in reporting aboard was penalized²⁰² as were groundless charges by the crew of vessel's unseaworthiness and their refusal on that ground to proceed on the voyage.²⁰³ Punishment was provided for seamen deserting or absenting themselves from duty, contrary to the shipping articles,²⁰⁴ and for harboring runaway seamen;²⁰⁵ and the apprehension of any deserter for delivery to justices of the peace and return to the vessel or other appropriate action was authorized.²⁰⁶ Following the controversy with Great Britain over impressment of seamen, Congress provided that citizens alone might be employed on board public and private vessels of the United States.²⁰⁷ An act apparently designed as a preliminary to insuring diplomatic protection for our seamen directed the President to appoint agents abroad to check up on the impression and detention of American seamen and to transmit copies of the statute to United States diplomatic representatives abroad.²⁰⁸ During the War of 1812, provision was made by which the Secretary of State was enabled to compensate persons in charge of vessels for returning to this country destitute and distressed American seamen stranded in foreign ports.²⁰⁹ Such provision was a logical development from earlier Congressional legislation which had directed the collection and disbursement of funds for the care and relief of sick and disabled American seamen in foreign ports or places,²¹⁰ including the care of rafters and boatmen voyaging down the Mississippi to New Orleans before the Louisiana Purchase.²¹¹ Appropriations of federal funds had likewise been made in aid of marine hospitals in American cities.²¹²

Abstentions from legislation and instances of formal acquiescence are suggestive. Some of the federal legislation was limited in its terms and all of it, except for that dealing with the District of Columbia and the tonnage tax, appears from the context to have been confined to the personnel of the maritime service engaged in foreign commerce. There was no mention in it of those employed in land transportation, none made of those engaged in sailing the interstate waterways (other than those in the District of Columbia), none in any way defining the terms and conditions

²⁰¹*Id.* at 131.

²⁰²*Ibid.*

²⁰³*Id.* at 132.

²⁰⁴*Id.* at 131, 133.

²⁰⁵*Id.* at 133.

²⁰⁶*Id.* at 134.

²⁰⁷ STAT. 809 (1813).

²⁰⁸ STAT. 477 (1796).

²⁰⁹ STAT. 146 (1814).

²¹⁰ STAT. 729 (1799).

²¹¹ STAT. 192 (1802).

²¹²*Ibid.*

on which a state should admit vessels or their crews coming from a sister state. Yet these were all matters of sufficient moment to have received consideration, more or less widespread, by the states. On the other hand, very early in its existence Congress provided expressly that pilots should continue to be regulated under state law until further provision was made by Congress.²¹³ With respect to the treatment of crews and the enforcement of shipping articles, Congress did deal rather extensively along lines parallel to the action of some of the states. As the cited authorities disclose, nearly all the state action was of considerable antiquity, very often antedating the Revolution. While scattered instances after 1787 perhaps indicate that no defect of state power was apprehended to have arisen out of the Constitution, as does also the inclusion of the older legislation in codifications of supposedly existing law, the abandonment of the field manifested by the scarcity of such statutes and their absence in all the chief commercial states would seem to indicate that the matter was one as to which federal action was thought to be not only constitutionally authorized but practically more effective than state legislation. As to interstate streams, however, regulations when deemed necessary were made by the states, not by Congress. Finally, the states showed a disposition to welcome the leadership of Congress in matters within its appropriate sphere of action, by such measures as that exempting from militia duty persons employed on coasting vessels licensed by the United States²¹⁴ and that limiting the availability of remedies afforded by the state for enforcing seamen's contracts to masters and owners who were American citizens and not engaged in violating the laws of the United States.²¹⁵

IV. RELATIONS WITH THE COMMUNITY AT LARGE (INCLUDING OTHER TRAVELLERS)

The actual formulation and promulgation of detailed rules and regulations respecting the general conduct of carriers and travellers was not infrequently left, either wholly or residually, to *ad hoc* administrative officials or to the governing authorities of franchise holders. Port wardens and harbor masters were thus vested with the power of making harbor regulations;²¹⁶ and the regulation and policing of vessels anchored within

²¹³1 STAT. 53 (1789).

²¹⁴N.J. COMP. PUB. LAWS (1833) 24 (Nov. 19, 1822).

²¹⁵1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 249 (Oct. 30, 1810).

²¹⁶ALA. DIG. LAWS (Toulmin 1823) 796 (Blakeley, Dec. 20, 1820); *id.* 584 (Mobile, Nov. 21, 1818); *id.* 869 (same, Dec. 23, 1822); MISS. REV. CODE (1824) 630 (Natchez, Jan. 26, 1821); 4 PA. LAWS (1802-08) 67 (Philadelphia, Mar. 29, 1803); 2 VA. REV. CODE (1819) 12 (1792); *cf.* 1 DIG. LA. ACTS (1804-27) 510 (Mar. 31, 1805); 1 S.C. DIG. PUB. STAT. LAWS (Brevard) 88 (boats and schooners bringing wood, brick, tanners' bark, and lumber to have convenient access to wharves for unloading to carts, as the wharfowners reasonably might direct, 1768).

city limits²¹⁷ or of the places and persons embraced within the port limits defined by statute²¹⁸ was entrusted to the regularly constituted municipal authorities. The occasional proviso that the regulations made and enforced should not be in conflict with the constitution or laws of the state or the United States²¹⁹ renders uncertain the assumed limitations on the authority granted, suggesting indeed a feeling that somewhere in the federal Constitution there might be limits on the jurisdiction of local authorities. Hindsight indicates the commerce clause as the basis for that feeling, a surmise perhaps strengthened by the provision that the local authorities to whom discretion was confided should not stop any vessel entering the harbor save in cases where there were diseased persons or damaged cargo aboard whose introduction might endanger the community,²²⁰ which speculatively may be thought to indicate a view that the Constitution operated to disable local authorities from excluding vessels engaged in interstate or foreign commerce except as a health measure. But this is pure guess; and the tonnage-tax clause, the privileges and immunities clause, or any one of several others may have been in the legislative mind rather than the commerce clause.

Quite often the activities of carriers and drovers were singled out for express mention and explicit prohibition in the general Sunday laws.²²¹ Licensing authorities were forbidden to license teamsters, carriers, or drovers to travel about their business on Sunday, and all outstanding licenses to that effect were declared void.²²² It was made quite clear that the statutes were to apply for one thing to common carriers, for another to enterprises of more than petty local concern, by the occasional express reference, in elaborating the description of the activities affected, to the

²¹⁷2 DIG. LA. ACTS (1804-27) 130 (New Orleans, Mar. 14, 1820); *cf.* Ohio Local Acts 1st Sess. 1825, p.61 (charter of Marietta, containing grant of power to regulate the landing of watercraft).

²¹⁸2 DIG. LA. ACTS (1804-27) 259 (Feb. 10, 1821).

²¹⁹See, *e.g.*, 2 DIG. LA. ACTS (1804-27) 130 (Mar. 4, 1820); 4 PA. LAWS (1802-08) 67 (Mar. 29, 1803).

²²⁰2 DIG. LA. ACTS (1804-27) 141 (Feb. 19, 1825).

²²¹ALA. DIG. LAWS (Toulmin 1823) 217 (travelling, loading, or unloading by the named classes of persons particularly forbidden, Mar. 12, 1803); CONN. PUB. STAT. (1824) 340; DEL. REV. STAT. (1829) 485 (Feb. 6, 1795); 1 ME. REV. LAWS (1821) 73; 2 MASS. LAWS (1780-1807) 536 (Mar. 8, 1792); N.J. REV. LAWS (1820) 378 (Mar. 16, 1798); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 273 (1712); *cf.* GA. DIG. LAWS (Prince 1819) 510 (reference to travel in Sunday law of Mar. 4, 1762, characterized by compiler as obsolete); R.I. REV. LAWS (1822) 414 (exception generally for those observing some other day than Sunday as the Sabbath but with the proviso that it should not grant any license to engage in "the lading, unlading, or fitting out of vessels").

²²²See, *e.g.*, N.H. COMP. LAWS (1830) 171 (June 22, 1814). *Contra*: VT. COMP. LAWS (1824) 604 (Mar. 3, 1797).

operation of a line of stages.²²³ Furthermore it may be premised that the exemption of "owners or drivers of carriages employed for carrying the United States mail"²²⁴ was inserted in attempted conformity to the supposed dictates of the Constitution. If so, the specification of only this one exemption would seem to imply a belief that the Constitution envisaged no other limitations on state control and hence that what was done was in no reasonably conceivable sense a regulation of "commerce between the several States." What then of the exemptions provided in like statutes elsewhere in favor of watermen landing their passengers, of ferrymen, or of persons removing with their families?²²⁵ These may be thought to imply a constitutional doubt as to the state's legislative jurisdiction over the subjects excepted or they may represent merely an act of legislative grace toward those whose activities would otherwise be impeded on a par with the common exemption for works of charity and necessity. The latter is probably correct for it will be noted that the exemptions were rather clearly focused on the movement of passengers with no corresponding proviso for those engaged in handling goods. Moreover, except as to migrating families, they were confined to the movement of persons by water without similar provision for land travellers. It would be surprising if the small portion of interstate commerce thus carved out were thought to be beyond the pale of state control while they might deal with the remainder at discretion.

Speed regulations were not uncommon, especially in connection with the use of bridges. Maximum rates of speed to be observed by those engaged in crossing such structures were specified.²²⁶ Particularly in view of the proviso occasionally inserted that the act should become effective as to any bridge upon the posting of notice of its terms by the proprietors²²⁷ and the restriction of the statute's applicability, sometimes found, to wooden bridges above a specified length,²²⁸ perhaps such measures were

²²³CONN. PUB. STAT. (1824) 342; N.J. REV. LAWS (1820) 380 (Mar. 16, 1798). The New Jersey statute was particularly clear in its design to reach interstate intercourse since it spoke expressly of driving stages "through" the state.

²²⁴CONN. PUB. STAT. (1824) 342.

²²⁵See, *e.g.*, INDIANA TERR. LAWS 1801-1809 (Philbrick) 367 (Sept. 17, 1807); Ind. Acts 1817-18, p.314 (applicable to toll bridge keepers also); Ohio Laws 1820, 2nd Part, p.43 (Jan. 3, 1816); 3 PA. LAWS (1791-1802) 177 (Apr. 22, 1794).

²²⁶CONN. PUB. STAT. (1824) 222 (toll bridges, no faster than a walk); DEL. REV. STAT. (1829) 585 (public bridges, same, Feb. 4, 1823); Mass. Sess. Laws Jan. 1822, p.718 (toll bridges, same); N.J. REV. LAWS (1820) 600 (toll or chain bridges, same, Feb. 8, 1816); N.J. COMP. PUB. LAWS (1833) 184 (named bridge, Feb. 29, 1828); 1 N.Y. REV. STAT. (1827-28) 525; 6 S.C. STAT. AT LARGE (McCord) 314 (toll bridges, Dec. 18, 1827); *cf.* Ohio Laws 1820, 2nd Part, p.64 (penalty for galloping horses over toll bridge, Feb. 4, 1815); PA. DIG. (Purdon) 736 (Mar. 19, 1824).

²²⁷See Mass. Sess. Laws Jan. 1822, p.718.

²²⁸See PA. DIG. (Purdon) 136 (sixty foot span, Mar. 19, 1824).

calculated rather to prevent injury to the facilities or evasion of tolls than to govern the conduct and relations *inter se* of highway users. There were other provisions aplenty, however, to show that this latter subject was regarded as one for state control. Among these also there were speed regulations, forbidding street travel through settled portions of named cities, including seaports, at an excessive rate of speed²²⁹ or limiting the permissible speed of travel on state-maintained canals.²³⁰ The "rule of the road," that travellers should keep to the right, whatever its origin in this country, was firmly established in the statute books of several states.²³¹ Street travel through the settled portions of named cities, including seaports, was forbidden unless the vehicle was under the prudent management of a careful driver and the beasts drawing it were under control.²³² The "road hog" was legislatively noticed in the statutory requirement that teamsters turn out and permit overtaking vehicles to pass.²³³

Those engaged in navigation were not absolved by the nature of their occupation from the necessity of conducting their activities with due regard for the property and rights of residents and of other users of the navigation nor did the states regard themselves as powerless to make and enforce appropriate regulations in this connection. Acts incidental to navigation which tended to the injury of riparian or coastal proprietors were reprehended. In combating a propensity to forage on land for supplies for vessels, the state legislatures forbade the taking by personnel of steamboats and other watercraft of firewood, materials for building and fencing, and the like, from the banks of rivers and watercourses,²³⁴ also the taking of stones or other ballast from any island or beach without the owner's consent²³⁵ although occasionally a limited right of "eminent domain" was provided, shipmasters being allowed to take in cases of necessity, upon making just compensation to the owner of the realty.²³⁶

²²⁹See, e.g., N.H. COMP. LAWS (1830) 160 (travel in Portsmouth at a gallop or over five miles per hour forbidden, Jan. 3, 1792).

²³⁰1 N.Y. REV. STAT. (1827-28) 245.

²³¹CONN. PUB. STAT. (1824) 394; DEL. REV. STAT. (1829) 520 (Feb. 1, 1808); N.H. COMP. LAWS (1830) 583 (July 2, 1822); N.J. REV. LAWS (1820) 568 (Feb. 18, 1813); 1 N.Y. REV. STAT. (1827-28) 695; OHIO LAWS, 2ND PART (1820) 287 (Jan. 7, 1811); 3 PA. LAWS (1791-1802) 82 (Apr. 9, 1792); 4 PA. LAWS (1802-08) 7 (Feb. 11, 1803); *id.* 27 (Mar. 24, 1803); *id.* 141 (Mar. 5, 1804); 5 PA. LAWS (1809-12) 280 (Jan. 17, 1812); R.I. REV. LAWS (1822) 439 (1815); 6 S.C. STAT. AT LARGE (McCord) 314 (Dec. 18, 1827); 2 VA. REV. CODE (1819) 221 (Feb. 7, 1817); *cf.* 1 N.Y. REV. STAT. (1827-28) 245 (same rule on state canals).

²³²N.H. COMP. LAWS (1830) 160 (Portsmouth, Jan. 3, 1792).

²³³CONN. PUB. STAT. (1824) 395; 7 PA. LAWS (1817-21) 254 (Mar. 6, 1820).

²³⁴1 DIG. LA. ACTS (1804-27) 497 (Mar. 17, 1820); 1 N.Y. REV. STAT. (1827-28) 161 (canals).

²³⁵2 ME. REV. LAWS (1821) 764; 2 MASS. LAWS (1780-1807) 996 (1713); Mass. Sess. Laws May 1818, p.7; *cf.* 4 MASS. LAWS (1807-16) 114 (Mar. 3, 1810).

²³⁶2 MASS. LAWS (1780-1807) 996 (1713).

Nor might persons engaged in navigation themselves create obstructions to the navigation. Short-sighted self interest was unlikely to prove an adequate governor of their conduct so the state took a hand in regulating it. The stationing, anchorage, and mooring of vessels in an orderly fashion was felt to be essential to the maximum utilization of available harbor facilities. The unique character of each port and the constantly changing circumstantial variations in the shipping present even in a single port indicated this, however, as being peculiarly a problem for local superintendence. Accordingly there was a pronounced tendency for the states to confide the regulation of this subject to the appropriate municipal authorities,²³⁷ and this same handling appealed to Congress legislating for the District of Columbia.²³⁸ Occasionally direct legislative cognizance was taken of the needs and conditions of particular important watercourses by statutes forbidding vessels to anchor at described places in the channel and prescribing the permissible manner of anchorage.²³⁹ Particularly in state canals, improper mooring and the obstruction of the canal by mismanagement of any boat or watercraft was prohibited.²⁴⁰ A time limit was placed on the anchorage of vessels in the fisheries located in interstate waterways,²⁴¹ exception being made, however, for vessels in distress; at certain seasons of the year such anchorage was wholly forbidden.²⁴² Recital that most of the offenders were non-residents and inclusion of special procedural provisions on account of that fact²⁴³ shows that the

²³⁷ALA. DIG. LAWS (Toulmin 1823) 784 (charter of Mobile, Dec. 17, 1819); *id.* 796 (port of Blakeley, Dec. 20, 1820); MISS. REV. CODE (1824) 630 (Natchez, Jan. 26, 1821); 1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 967 (charter of St. Louis, Dec. 9, 1822); N.J. REV. LAWS (1820) 66 (charter of Perth Amboy, Dec. 21, 1784); *id.* 73 (charter of Burlington, Dec. 21, 1784); N.J. COMP. PUB. LAWS (1833) 201 (charter of Jersey City, Jan. 23, 1829); R.I. REV. LAWS (1822) 460 (Providence); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 21 (charter of Beaufort, 1803); *id.* 36 (charter of Charleston, 1783); *id.* 144 (charter of Georgetown, 1805); 2 VA. REV. CODE (1819) 127 (1792, 1797); VA. REV. CODE (Supp. 1833) 394 (Mar. 3, 1821); *cf.* 1 N.Y. REV. STAT. (1827-28) 244 (berths to be assigned canal boats by toll collector or superintendent in case of dispute); 2 N.C. REV. LAWS (1821) 983 (appointment of harbor master at Wilmington authorized, 1802); 4 PA. LAWS (1802-08) 67 (vesting power in Board of Wardens for Port of Philadelphia, Mar. 29, 1803); VA. REV. CODE (Supp. 1833) 396 (harbor master for Norfolk harbor, Feb. 17, 1823).

²³⁸2 STAT. 195 (1802) (charter of Washington); *id.* 332 (1805) (charter of Georgetown); 3 STAT. 583 (1820) (charter of Washington).

²³⁹See, *e.g.*, N.J. REV. LAWS (1820) 571 (Delaware River in the vicinity of head of tidewater, Feb. 9, 1815); *cf. id.* 231 (authorizing stowing boats in a public road in Cape May County within a certain distance of the high water mark, Feb. 23, 1796).

²⁴⁰1 N.Y. REV. STAT. (1827-28) 246; Ohio Sess. Acts 1st Sess. 1826, p.47.

²⁴¹1 MD. LAWS 1692-1839 (Dorsey) 551 (Susquehanna River and headwaters of Chesapeake Bay, Nov. 1807); *id.* 763 (same, Dec. 1820).

²⁴²N.J. REV. LAWS (1820) 541 (anchorage in fishing grounds in Delaware River during shad fishing season, Nov. 26, 1808).

²⁴³See 1 MD. LAWS 1692-1839 (Dorsey) 126 (Mar. 1774).

regulations were not only operative as to persons engaged in extrastate voyages but that such persons bore the brunt of the regulation. Shipmasters who attempted to use improved watercourses too shallow for their vessel's draft and getting lodged in the channel were to be fined.²⁴⁴ To prevent the creation of obstructions of a more permanent nature, a number of states prohibited the discharge of ballast, the felling of trees, or other similar acts, calculated to foul the harbor or waterway, whether by the ship's company or by the general public.²⁴⁵

Even as to the details of navigation, the states asserted an authority paramount to those in charge of the vessel where there were competing interests to be considered and protected. For instance, it was provided that, on approaching the draw of a bridge, the motion communicated to the vessel by its engine or sails should be stopped and the vessel warped through the draw without use of sails or machinery.²⁴⁶ Boats engaged primarily in the carriage of freight were required to give the right of way to those engaged primarily in the carriage of passengers, in passing on the state's canals.²⁴⁷ It was forbidden to fasten a ship to a bridge²⁴⁸ or to floating bridges.²⁴⁹ Caulking by the use of fire was prohibited at certain localities²⁵⁰ as was the keeping of fire on board after nightfall unless a license had been obtained.²⁵¹

Exemptions from sumptuary regulations were occasionally granted by the states. Thus, by proviso to statutes requiring licenses for sales of

²⁴⁴3 S.C. DIG. PUB. STAT. LAWS (Brevard) 240 (Watts cut, 1738).

²⁴⁵ALA. DIG. LAWS (Toulmin 1823) 703 (Dec. 1, 1814); CONN. PUB. STAT. (1824) 315; GA. DIG. LAWS (Prince 1819) 201 (Apr. 7, 1763); *ibid* (extended to places above high water mark, Mar. 25, 1765); 2 ME. REV. LAWS (1821) 764; 2 MASS. LAWS (1780-1807) 996 (1713); MISS. REV. CODE (1824) 361; N.H. COMP. LAWS (1830) 281 (June 16, 1792); 1 N.C. REV. LAWS (1821) 452 (May 17, 1783); *id.* 485,486 (1784); 1 S.C. DIG. PUB. STAT. LAWS (Brevard) 414 (1726) 3 *id.* 254 (1785); 2 VA. REV. CODE (1819) 229 (1748); *cf.* GA. DIG. LAWS (Prince 1819) 433 (Mar. 12, 1774); 1 MD. LAWS 1692-1839 (Dorsey) 79 (Mar. 1734); *id.* 85 (May 1747); *id.* 101 (placing earth or stone in Patapsco River or Baltimore harbor, Oct. 1753); N.J. REV. LAWS (1820) 571 (dumping paving stones into Delaware River, Feb. 9, 1815); 1 N.Y. REV. STAT. (1827-28) 246 (sinking boats or other matter in state canals); 2 N.C. REV. LAWS (1821) 883 (1798); Ohio Sess. Acts 1st Sess. 1826, p.47 (sinking boats or other matter in state canals); 1 TENN. LAWS (Scott 1820) 569 (Apr. 23, 1796); VT. COMP. LAWS (1824) 281 (Nov. 5, 1801); 2 VA. REV. CODE (1819) 298 (ballast masters appointed to superintend discharge of ballast; casting it overboard without or contrary to terms of notice penalized).

²⁴⁶CONN. PUB. STAT. LAWS (1826) 492; *cf.* 1 S.C. DIG. PUB. STAT. LAWS (Brevard) 131 (1788).

²⁴⁷1 N.Y. REV. STAT. (1827-28) 245.

²⁴⁸N.J. COMP. PUB. LAWS (1833) 184 (named bridge, vessel of over three tons burden, Feb. 29, 1828); R.I. REV. LAWS (1822) 497 (named bridge, 1757).

²⁴⁹2 N.C. REV. LAWS (1821) 1494 (1819).

²⁵⁰1 PA. LAWS (1700-80) 129 (Philadelphia, Aug. 26, 1721); 4 PA. LAWS (1802-08) 67 (Mar. 29, 1803).

²⁵¹1 PA. LAWS (1700-80) 129 (after eight P.M., Aug. 26, 1721).

liquor for consumption on the premises, shipboard sales were relieved from the requirement;²⁵² but the exemption terminated and the license requirement attached after the vessel should have been moored within the state for a prescribed period.²⁵³ The specification of such an exemption might be taken to imply a belief that in its absence the ship would be fully subject to all the regulations locally prevailing or to support the contrary argument that the exclusion arose from a desire not to infringe on matters withdrawn from state control by the Constitution; but the pre-Constitutional date of enactment of some of the statutes argues forcibly against the constitutional conjecture and correspondingly in favor of the alternative assumption of existing state power not fully exercised. Corroboration for the hypothesis that the states considered themselves to possess ample power to prescribe police regulations even for vessels is found in occasional legislation expressly extending its operation to them, as, for example, prohibiting gaming, dicing, or card playing or the maintenance of billiard tables on any canal boat or vessel for the carriage of passengers.²⁵⁴

The states undertook the protection of vessels lying within their territorial waters against sundry injuries and harms, frequently employing the sanctions of the criminal law in their exercise of this head of jurisdiction. It was made a punishable offense to destroy vessels,²⁵⁵ take them away without the owner's consent,²⁵⁶ or cut them from their moorings.²⁵⁷ Statutory extensions of the felonies of arson, burglary, and larceny treated the burning,²⁵⁸ or the breaking and entering²⁵⁹ of vessels or the larceny of

²⁵²1 MD. LAWS 1692-1839 (Dorsey) 158 (for sale to crew only, Mar. 1780); 1 N.Y. REV. STAT. (1827-28) 682.

²⁵³1 N.Y. REV. STAT. (1827-28) 682 (one hour).

²⁵⁴*Id.* at 661.

²⁵⁵ALA. DIG. LAWS (Toulmin 1823) 232 (Dec. 17, 1821); GA. DIG. LAWS (Prince 1819) 370 (Dec. 20, 1817); *cf.* KY. DIG. STAT. LAWS (Moorhead & Brown 1834) title 136 (doing any act directed to the casting away or loss of vessel, Dec. 19, 1801); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 352 (same, 1783).

²⁵⁶KY. DIG. STAT. LAWS (Moorhead & Brown 1834) title 31 (Jan. 16, 1798); *cf.* 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 271 (1754).

²⁵⁷ALA. DIG. LAWS (Toulmin 1823) 232 (Dec. 17, 1821).

²⁵⁸CONN. PUB. LAWS (1824) 99; 1 DIG. LA. ACTS (1804-27) 383 (Feb. 22, 1817); 1 ME. REV. LAWS (1821) 59; 1 MD. LAWS 1692-1839 (Dorsey) 576 (Nov. 1809); 3 MASS. LAWS (1780-1807) 291 (Mar. 16, 1805); N.H. COMP. LAWS (1830) 138 (Jan. 2, 1829); N.J. REV. LAWS (1820) 251 (Mar. 18, 1796); 2 N.Y. REV. STAT. (1827-28) 667.

²⁵⁹INDIANA TERR. LAWS 1801-09 (Philbrick) 235 (Sept. 17, 1807); IND. ACTS 1817-18, p.76; 1 ME. REV. LAWS (1821) 62; 1 MASS. LAWS (1780-1807) 233 (Mar. 15, 1785); 3 *id.* 345 (Mar. 13, 1806); 1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 16 (Oct. 1, 1804).

goods therefrom²⁶⁰ or of the vessels themselves²⁶¹ as equivalent to similar conduct committed against or within buildings. It is not now readily apparent what evil was sought to be corrected by legislation forbidding and penalizing the forcible, fraudulent, or secret removal of vessels from the state.²⁶² Perhaps the pre-Constitutional date of enactment²⁶³ justifies the inference of a purpose to enforce state laws respecting clearance of vessels and the obtaining of proper papers; if so, the adoption of the Constitution and the prompt Congressional action in adopting a navigation law, setting up ports of entry and providing in detail for the entry and clearance of vessels, dispensed with their original basis leaving their inclusion in later revisions of state statutes explicable only on the basis either of pure inadvertence of the reviser or of power in the states to supplement with additional penalties the punishments congressionally prescribed for violations of regulations enacted under the exclusive power of Congress over commerce. The wrecker's ancient practice of showing false lights from land in order to lure vessels on to rocks or shoals was visited by the states with the severest penalties²⁶⁴ and the plundering of wrecks or vessels in distress was made a felony.²⁶⁵ Even to enter on a stranded vessel unless summoned by proper authorities was penalized²⁶⁶ as was interference with efforts to save or assist vessels in distress.²⁶⁷

²⁶⁰ MASS. LAWS (1780-1807) 295 (Mar. 16, 1805); 1 LAWS OF DIST. & TERR. L.A. and TERR. & STATE MO. (1842) 209 (Nov. 4, 1808); N.H. COMP. LAWS (1830) 143 (Jan. 2, 1829); 2 N.Y. REV. STAT. (1827-28) 679.

²⁶¹ MD. LAWS 1692-1839 (Dorsey) 577 (Nov. 1809).

²⁶² Cf. DEL. REV. STAT. (1829) 123 (Feb. 5, 1782).

²⁶³ But cf. KY. DIG. STAT. LAWS (Moorhead & Brown 1834) title 31 (penalizing the taking away of boats without the consent of the owner, Jan. 16, 1798). Conceivably this may be aimed at the same sort of conduct as the Delaware legislation cited *supra* note 262. This would seem doubtful, however, because of reference to consent of the owner in the Kentucky but not in the Delaware statute and because the Kentucky statute, while apparently broad enough to reach clandestine removal beyond the borders of the state, does not seem to be confined to that situation but appears to embrace all removals, whether to points within or to those beyond the state. The same is true of 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 271 (1754), which expressly mentions removal either within or beyond the state; the South Carolina statute does not, it is true, mention the consent of the owner, but it penalizes removal with intent to deprive the owner and so seems in substance to be the same as the Kentucky statute.

²⁶⁴ DEL. REV. STAT. (1829) 559 (Feb. 2, 1786); N.J. REV. LAWS (1820) 722 (Mar. 3, 1820).

²⁶⁵ DEL. REV. STAT. (1829) 559 (Feb. 2, 1786); GA. DIG. LAWS (Prince 1819) 553 (Dec. 20, 1817); KY. DIG. STAT. LAWS (Moorhead & Brown 1834) title 136 (Dec. 19, 1801); 3 S.C. DIG. PUB. STAT. LAWS (Brevard) 352 (1783); 2 VA. REV. CODE (1819) 132 (June 20, 1782); cf. 1 MD. LAWS 1692-1839 (Dorsey) 422 (Nov. 1799).

²⁶⁶ MD. LAWS 1692-1839 (Dorsey) 422 (Nov. 1799); N.J. REV. LAWS (1820) 716 (Mar. 3, 1820); cf. 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 355 (authorizing prevention by force, 1783).

²⁶⁷ MD. LAWS 1692-1839 (Dorsey) 422 (Nov. 1799); 2 VA. REV. CODE (1819) 132 (June 20, 1782); cf. 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 355 (authorizing prevention by force, 1783).

Assistance to vessels in distress and preservation of the hulls and cargoes of those lost at sea were, indeed, the subjects of an extensive body of state legislation.²⁶⁸ In broad outline the statutes of the several states on the subject of wreck were alike. Designated officials were authorized to summon the assistance of persons in the locality for the purpose of saving imperilled vessels and the persons and goods on board; private individuals were required to make public declaration before appropriate officials of any goods they had salvaged or any drifting cargo of a wrecked vessel taken up by them and to deliver such articles into official custody; heavy penalties were prescribed for the clandestine withholding of goods; an elaborate procedure was provided for the advertisement of salvaged vessels and cargo and for securing to the salvors an award for their services; and the authorities in charge were authorized to sell goods of defined classes or under defined circumstances by auction in a defined manner or to hold them for the owner. By some statutes the local authorities in summoning aid for a vessel in distress were authorized to call for help on other vessels riding nearby,²⁶⁹ a provision sometimes confined to the requisitioning of vessels of local registry in the enacting state.²⁷⁰ Contracts of pilots with vessels in distress were declared void.²⁷¹ Essentially similar legislation existed as to taking up stray boats and canoes, imposing a duty on the taker-up to give notice and compensating him for compliance by provision for a reward;²⁷² and in Louisiana there was comparable provision for anchors taken up in the Mississippi.²⁷³

The statutes respecting drifting logs and timber may appropriately be noted here. Logging is a peculiar enterprise whose goods need no vessel for their transportation, themselves being, so to speak, at once vessel and cargo. The states along whose great river basins the products

²⁶⁸See CONN. PUB. STAT. (1824) 439; DEL. REV. STAT. (1829) 559 (Feb. 2, 1786); 1 ME. REV. LAWS (1821) 88; 1 MD. LAWS 1692-1839 (Dorsey) 422 (Nov. 1799); 4 MASS. LAWS (1807-16) 468 (Mar. 2, 1815); 1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 501 (Jan. 23, 1817); N.J. REV. LAWS (1820) 716 (Mar. 3, 1820); 1 N.Y. REV. STAT. (1827-28) 690; 2 N.C. REV. LAWS (1821) 957 (1801); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 351 (1783); 2 VA. REV. CODE (1819) 132 (1782).

²⁶⁹See, *e.g.*, DEL. REV. STAT. (1829) 559 (Feb. 2, 1786).

²⁷⁰See, *e.g.*, 1 MD. LAWS 1692-1839 (Dorsey) 422 (Nov. 1799).

²⁷¹*Id.* at 483 (Nov. 1803).

²⁷²DEL. REV. STAT. (1829) 75 (1743); Ill. LAWS 1819, p.206; Ill. LAWS 1822-23, p.167; INDIANA TERR. LAWS 1801-09 (Philbrick) 297 (Sept. 17, 1807); Ind. Acts 1817-18, p. 340; KY. DIG. STAT. LAWS (Moorhead & Brown 1834) title 169 (Feb. 10, 1798); 1 MD. LAWS 1692-1839 (Dorsey) 98 (Oct. 1753); 1 LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842) 501 (Jan. 23, 1817); OHIO LAWS, 2ND PART (1820) 28 (expressly applicable to drifting boats "within this state or any of the waters adjoining thereto," Jan. 22, 1810); 1 VA. REV. CODE (1819) 445 (1785).

²⁷³1 DIG. LA. ACTS (1804-27) 521 (Mar. 1, 1826).

of the logging industry were floated to market had a problem as to them not unlike that presented by drifting boats or cargo cast ashore. They responded to it with analogous legislation—reports to be made by the taker-up which were made matter of public record, penalties imposed for secret appropriation without a report, holding of the logs or timber to await a claim by the owner, and allowance of a defined reward to takers-up complying with the statutory command.²⁷⁴ Should the owner not appear to claim the timber within a fixed period, the taker-up who had duly complied was entitled to it.²⁷⁵

For the protection of bridges and dams, some states required that persons driving or floating logs down an interstate river might do so only if the logs were bound in rafts and in charge of a competent driver, imposing liability for all damages which might accrue in the event of non-compliance;²⁷⁶ there is, however, an occasional intimation in the statutes that, useful as such measures might be to prevent injuries to river structures and banks, they had still more particularly in view protection to the local industry of the enacting state and were deliberately devised to discourage interstate movement of commodities of this character.²⁷⁷

At least for the purpose of satisfying claims arising out of misconduct in their use, vessels plying to extrastate ports were treated as property subject to the control of the states. Execution on and sale of them was specifically authorized where they had been the instruments by which statutory prohibitions were violated.²⁷⁸ The states undertook to grant pilots what was in effect a lien on the hulls and appurtenances of vessels

²⁷⁴See CONN. PUB. STAT. (1824) 425 (Connecticut and Housatonic Rivers); 2 ME. REV. LAWS (1821) 749; 1 MASS. LAWS (1780-1807) 52 (Connecticut River, Apr. 28, 1781); *id.* 335 (July 6, 1786); 2 *id.* 610 (Saco River, Feb. 22, 1794); 3 *id.* 25 (same, June 16, 1801); 3 *id.* 237 (Connecticut and Merrimack Rivers, June 20, 1804); 3 *id.* 399 (Saco River, Feb. 28, 1807); Mass. Sess. Laws, Jan. 1818, p.482; Mass. Sess. Laws Jan. 1819, p.141; 1 N.Y. REV. STAT. (1821-28) 626; 5 PA. LAWS (1809-12) 335 (Mar. 20, 1812); 1 VT. COMP. LAWS (1807) 373 (Nov. 6, 1800).

²⁷⁵2 ME. REV. LAWS (1821) 749; 1 MASS. LAWS (1780-1807) 52 (Connecticut River, Apr. 28, 1781); 3 *id.* 25 (Saco River, June 16, 1801); 4 MASS. LAWS (1807-16) 524 (same, Feb. 16, 1816); VT. COMP. LAWS (1824) 282 (Connecticut River, Nov. 5, 1801); *cf.* N.H. COMP. LAWS (1830) 180 (Dec. 28, 1805).

²⁷⁶4 MASS. LAWS (1807-16) 462 (Connecticut River, Mar. 1, 1815); N.H. COMP. LAWS (1830) 189 (same, June 10, 1808). *But cf. id.* at 190 (removing named portion of the river from the operation of the law, Jan. 3, 1829).

²⁷⁷See the preamble to N. H. COMP. LAWS (1830) 189 (June 10, 1808): "Whereas the present mode of putting pine timber into Connecticut river, and letting it float at random down the same, does great injury to the mills, bridges, [etc.] and is a great damage . . . by wearing away the banks of said river . . . *but is more particularly discouraging to and almost wholly prevents the manufacture thereof in our own country . . .*" (Italics supplied).

²⁷⁸See KY. DIG. STAT. LAWS (Moorhead & Brown 1834) title 31 (carrying colored persons beyond the state, Jan. 7, 1824).

for a limited period to secure payment of their fees.²⁷⁹ Persons furnishing materials and labor in the building and fitting of vessels for sea were given a state-created lien on the body, tackle, furniture, and apparel of the ship to secure payment.²⁸⁰ Occasionally procedure was formulated for the enforcement of such maritime liens, designed to obviate difficulties occasioned by vesting the admiralty jurisdiction in the federal courts²⁸¹ and so was procedure governing the attachment and sale as well of vessels owned in other states and countries as of those owned in the enacting state.²⁸²

Of federal legislation on the relative rights and liabilities of persons in the carrying trade and the general public, including the travelling public, there was really none. True, as the local legislature for the District of Columbia, Congress had delegated supervision of the anchorage of vessels in the District to the municipalities of Washington and Georgetown.²⁸³ True, also, it made it a criminal offense, under its power to declare and punish felonies on the high seas, wilfully to destroy or cast away a ship on the high seas;²⁸⁴ while, in connection with the customs administration, it prescribed the allotted time for unlading vessels arriving from foreign ports,²⁸⁵ a provision which might on occasion tend to relieve harbor congestion. Both of these statutes, however, were plainly addressed to the conduct of the ship's company; neither was at all related to interstate commerce and indeed both were so clearly connected with other grants of power that it is doubtful whether they were under the head of commerce regulation at all. As to land travel, as to inland or coastal waterways outside the District, there is no trace of federal legislation. The entire mass of dealings between carriers and their fellow Americans who were neither hiring them nor being hired by them was left to the states to control.

²⁷⁹See, e.g., 2 MASS. LAWS (1780-1807) 776 (limited to Boston, Mar. 10, 1797).

²⁸⁰2 PA. LAWS (1780-91) 95 (Mar. 27, 1784); 7 PA. LAWS (1817-21) 161 (Mar. 5, 1819).

²⁸¹Cf. 3 PA. LAWS (1791-1802) 89 (Feb. 9, 1793).

²⁸²2 N.Y. REV. STAT. (1827-28) 5. The control of the states over vessels as property is further revealed in the terms of the statutes relating to auction duties and licenses, which quite commonly were expressly made applicable to auction sales of ships, with exceptions sometimes made as to the sale of wrecked or stranded vessels. See ALA. DIG. LAWS (Toulmin 1823) 738 (Nov. 21, 1818); GA. DIG. LAWS (Prince 1819) 25 (Dec. 8, 1794); 1 DIG. LA. ACTS (1804-27) 32 (Mar. 15, 1827); 2 S.C. DIG. PUB. STAT. LAWS (Brevard) 323 (1785). *But cf.* 1 N.Y. REV. STAT. (1827-28) 529 (exempting sales of ships and vessels from auction duties).

²⁸³See statutes *supra* note 238.

²⁸⁴2 STAT. 290 (1804).

²⁸⁵3 STAT. 640 (1821).

V. EXTRA-STATUTORY MATERIALS

The non-statutory materials are too meagre and occasional to afford much assistance in a systematic view of the law.

In one particular, indeed, it was definitely settled by the courts that ultimate power was in the federal government with the state laws possessing at most a subsidiary permissive validity. That subject was the employment relation between ship and crew where interstate or international sea voyages were involved—its consequences and its enforcement. It will be remembered from the earlier discussion that this was the one matter on which there was Congressional action of a relatively comprehensive nature and corresponding state inaction. It also produced the only three decisions before *Gibbons v. Ogden* on regulation of the transportation enterprise—decisions which, in each instance, recognized the field as one for federal cognizance.

The Virginia court, in *Ex parte Pool*,²⁸⁶ approved, two judges dissenting, an early instance of "dual federalism," by which state officials were used as part of the enforcement machinery for the federal statute²⁸⁷ for specific performance of shipping articles authorizing apprehension of deserting seamen and their commitment by justices of the peace. Habeas corpus was denied seamen so taken up who had contracted in Boston for trips to sundry other ports and return and had, before full performance, left the ship, apparently in Virginia. The entire court agreed that Congress might properly legislate for the specific performance of marine shipping articles under the conjoint authority of the commerce clause and the "necessary and proper" clause. No state regulation was in issue; but the majority opinion, to show the state's policy, referred with evident approval²⁸⁸ to a Virginia statute²⁸⁹ adopting for foreign seamen an analogous obligation and procedure, the federal statute by its terms being limited to contracts made in the United States. The implication was that both state and federal statutes were constitutionally proper and that they were reciprocally operative to form one complete system.

The touchy problem of negro crews coming into the slave states was presented by the two federal decisions of the time, each of special interest as a decision on circuit by an eminent justice of the United States Supreme Court. *The Wilson v. United States*,²⁹⁰ reversing the forfeiture of

²⁸⁶2 Va.Cas. 276 (1821).

²⁸⁷*Supra* note 200.

²⁸⁸*Ex parte Pool*, 2 Va.Cas. 276, 282 (1821).

²⁸⁹2 VA. REV. CODE (1819) 131 (1805).

²⁹⁰30 Fed.Cas. 239 (1820).

a Venezuelan privateersman for alleged violation of a federal statute²⁹¹ prescribing compliance with state statutes forbidding the introduction of negroes, turned on the narrow issues that (1) the relevant Virginia law²⁹² had not been violated since its prohibition of shipmasters' bringing colored crews into the state was coupled with a proviso relieving them should the seamen depart with the ship, which there was no showing would not have been done in the instant case and (2) the Virginia act applied only to "free negroes and mulattoes" as against the federal coverage of "any negro, mulatto or any person of color" and the proof showed only that the seamen were "persons of color" without showing them to be "negroes or mulattoes," hence establishing no violation of the Virginia statute nor of the implementing federal act. The decision is, therefore, of no great consequence. The opinion is something else again. As Marshall's first recorded judicial pronouncement on the commerce clause, its broad assertion of federal control over navigation,²⁹³ foreshadowing his stand in *Gibbons v. Ogden*,²⁹⁴ is perhaps of primary interest; scarcely secondary is the fact of his discussing, with no intimation of disapproval, Virginia's legislation as to colored seamen.

Justice Johnson,²⁹⁵ in invalidating in *Elkinson v. Deliesseline*²⁹⁶ a statute of his home state, South Carolina, illuminated much more fully the law as to regulation of the transportation enterprise. That the seizure in Charleston harbor of the colored seaman, a British subject employed on a British ship under shipping articles executed in Liverpool, had provoked diplomatic representations by Canning as being a breach of the 1815 commercial convention with Great Britain dramatized the consequences latent in uninhibited state action; but it is doubtful that the circumstance was greatly influential of Johnson's decision. The invalidated statute directed that, should any vessel enter the state having aboard as crew members free

²⁹¹2 STAT. 205 (1803).

²⁹²1 VA. REV. CODE (1819) 437.

²⁹³The *Wilson v. United States*, 30 Fed.Cas. 239, 243 (1820): "There is not in the constitution one syllable on the subject of navigation. And yet every power that pertains to navigation has been uniformly exercised, and, in the opinion of all, been rightfully exercised by congress. From the adoption of the constitution, till this time, the universal sense of America has been, that the word 'commerce' as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce. I could feel no difficulty in saying that the power to regulate commerce clearly comprehends the case, were there no other clauses in the constitution, showing the sense of the convention on that subject . . ."

²⁹⁴Curiously there seems to be no citation of this case by either court or counsel in *Gibbons v. Ogden*. Oversight, uncertainty of implications, or what?

²⁹⁵A valuable brief account of this somewhat forgotten major judicial figure is to be found in Morgan, *Mr. Justice William Johnson and the Constitution* (1944) 57 HARV. L. REV. 328.

²⁹⁶8 Fed.Cas. 493 (C.C.D.S.C. 1823).

negroes or persons of color, the state officials should seize such persons and hold them in custody until the ship's departure, the captain being liable to pay the expenses of detention and the negroes to be sold as slaves should the ship leave without them. South Carolina, when appraised of the diplomatic correspondence, freed the seamen and made no further effort to enforce the statute; but a voluntary association rushed to the statute's defense, resting its case on state sovereignty, the asserted right of necessity, and at bottom on a premonitory suggestion of secession. But Johnson was unequivocal in his condemnation, saying

On the unconstitutionality of the law under which this man is confined, it is not too much to say, that it will not bear argument . . . The object of this law, and it has been so acknowledged in argument, is to prohibit ships coming into this port employing colored seamen, whether citizens or subjects of their own government or not. . . . I am far from thinking that this power would ever be wantonly exercised, but these considerations show its utter incompatibility with the power delegated to Congress to regulate commerce with foreign nations and our sister states. . . . Now, according to the laws and treaties of the United States, it was both lawful for this seaman to come into this port, in this vessel, and for the captain to bring him in in the capacity of a seaman; and yet these are the very acts for which the state law imposes these heavy penalties. Is there no clashing in this? . . . If Congress can regulate commerce, what commerce can it not regulate? And the navigation of ships has always been held, by all nations, to appertain to commercial regulations.

At the same time he was careful to limit his opinion so as to preserve to the states a considerable area of control, saying

But I deny that the state surrendered a single power necessary to its security, against this species of property. What is to prevent their being confined to their ships, if it is dangerous for them to go abroad? This power may be lawfully exercised. To land their cargoes, take in others, and depart, is *all that is necessary to ordinary commerce*, and is all that is properly stipulated for in the convention of 1815, so far as it relates to seamen . . .²⁹⁷

with a *caveat*, based on the convention, as to fuller rights for colored masters and supercargoes. The line was clear. Ingress and egress of maritime traffic was withdrawn from the state's power to condition or prevent, by virtue of the commerce clause; but the behavior and conduct of the instrumentalities of such traffic were for the state to control while they were within its borders.

²⁹⁷*Id.* at 494, 495, 496. Italics supplied.

The sparse materials in the pioneer treatise on American constitutional law agree with the judicial materials which have just been examined as to the scope of federal control over the terms and enforcement of shipping articles, either under the commerce clause generally²⁹⁸ or under the grant of power over foreign commerce;²⁹⁹ so also does language used in Congress.³⁰⁰

There is only the flimsiest trace of attention to the regulation of other phases of the transportation enterprise to be found outside the statute books. Provision for "hospitals for disabled seamen and other establishments incident to commerce" was recognized as an appropriate object for Congressional solicitude³⁰¹ although it was also felt that the states could properly concern themselves with provision for such persons.³⁰² The "regulations respecting freighters and owners"³⁰³ were referred to as "proper and necessary regulations of commerce."³⁰⁴ The distinction taken by Mr. Justice Johnson, in *Elkison v. Delieesseline*, between permitted and forbidden state regulation peers out of Gallatin's comment that "the State Governments had . . . something to do with the internal regulations of their ports";³⁰⁵ and its converse, that Congress should leave such matters alone, seems to have been motivating factor in the shelving of proposed federal legislation for the preservation of the peace in harbors.³⁰⁶ While

²⁹⁸1 TUCKER'S BLACKSTONE APPENDIX (1803) 252.

²⁹⁹SERGEANT, CONSTITUTIONAL LAW (1822) 291.

³⁰⁰See 2 ANNALS OF CONG. 1933 (1882) (House of Representatives, 1791). But cf. 12 *id.* 472 (where, in the debate over the federal statute forbidding introduction of negroes in violation of state laws, 1803, the suggestion was made of unconstitutionality as to negroes or mulattoes who were citizens of the United States going as navigators or otherwise to the ports of states which forbade their entry, with no mention of possible commerce clause objections).

³⁰¹1 ANNALS OF CONG. 176 (1882) (Madison in the House of Representatives, Apr. 21, 1789); 8 *id.* 1391 (April 10, 1797).

³⁰²See 8 ANNALS OF CONG. 1391 (1882) (Apr. 10, 1797); cf. 3 *id.* 695 (Williamson in the House of Representatives, Nov. 19, 1792, calling approving attention to a North Carolina law "to raise money by a tax on the wages of seamen for the support of sick and infirm seamen").

³⁰³The provisions related exclusively to foreign commerce.

³⁰⁴2 ANNALS OF CONG. 1933 (1882) (1791).

³⁰⁵5 *id.* 1353 (May 12, 1796).

³⁰⁶"Mr. R. Griswold had two objections . . . The other objection was on the ground of the Constitution. He did not see that Congress had power to punish crimes committed against a state, or in its ports or harbors. The Constitution expressly gave Congress power to punish crimes and piracies committed on the high seas, but not within a State's limits.

"Mr. Smilie . . . the last objection, that it was unconstitutional, deserved very serious reflection . . .

"Mr. Nicholson had no objection to the Committee rising but he would not have it understood that he had any Constitutional difficulties to struggle with. Congress had powers sufficient to enforce their revenue laws and this very bill contemplates this as one circumstance that may occur and be corrected." 12 ANNALS OF CONG. 704, 705 (1882) (House of Representatives, Nov. 26, 1804). The bill was laid over for final consideration and does not appear to have become law.

the House of Representatives once went so far in the consideration of wreck and salvage as to refer a resolution for a report on that subject to its Committee on Commerce and Navigation,³⁰⁷ the field was left to the coverage of the fairly extensive body of state legislation³⁰⁸ and seems to have been regarded by professional opinion as appropriately a matter for state regulation, at least until Congress should have acted.³⁰⁹

Regulation of the anchorage of vessels was deemed to be a matter within the legislative competence of the states.³¹⁰ So was the punishment of theft as well in the state's coastal waters as in its land area.³¹¹ Differences between Maryland and Virginia pilots led to a tolerably full consideration of the states' control over pilotage regulations³¹² but the upshot was to leave unaltered the very early federal statute³¹³ approving state regulation of pilotage, and the difficulty was eventually resolved by the legislatures of the states affected.³¹⁴ So far as coastal shipping between ports within a state was concerned, that seems to have been regarded as wholly and absolutely immunized from federal regulation and subject to state control, apparently without reference to its relations to or connection with interstate or foreign commerce.³¹⁵

As for land transportation, one lonesome allusion to it has been found, consisting of an assumption *arguendo* as an incontrovertible premise (which was indeed not controverted) that Congress did not have power to regulate "what weights shall be carried on [the] roads and at what seasons of year."³¹⁶

VI. SUMMARY AND CONCLUSIONS

Congress regulated rates and charges, pilotage, harbor control, and what have you, within the District of Columbia; it defined and provided punishments for felonies on the high seas; it regulated the lading and unlading of vessels incident to the system of customs administration; it ap-

³⁰⁷10 *id.* 547 (1800).

³⁰⁸See statutes *supra* note 268.

³⁰⁹See 1 TUCKER'S BLACKSTONE APPENDIX (1803) 252.

³¹⁰See *City Council of Charleston v. Rogers*, 2 McCord 502 (S.C. 1823); 5 ANNALS OF CONG. 1364 (1882) (Jonathan Dayton, Speaker, in the House of Representatives, May 13, 1796).

³¹¹6 ANNALS OF CONG. 1732 (1882) (Dec. 29, 1796).

³¹²The matter was discussed in the House of Representatives on January 24, 1797, see 6 ANNALS OF CONG. 1982, 1983 (1882) and again on January 4, 1798, see 7 *id.* 801, 802.

³¹³*Supra* note 213.

³¹⁴See statutes *supra* notes 192, 193.

³¹⁵19 ANNALS OF CONG. 965 (1882) (Quincy in the House of Representatives, Dec. 30, 1808); 1 TUCKER'S BLACKSTONE APPENDIX (1803) 250.

³¹⁶3 ANNALS OF CONG. 307 (1882) (1792).

proved state imposition of tonnage charges for the erection of marine hospitals. These matters were all relevant to the operation of the transportation enterprise but all were covered by specific constitutional language outside the commerce clause. Aside from particularized grants, federal legislation merely prescribed the minimum quality of service to be afforded by ships to passengers to or from foreign countries, expressly abdicated to the states the regulation of pilotage, and supervised the terms and enforcement of shipping articles and penalized desertion—matters connected exclusively with seafaring enterprise and, one may surmise, principally with foreign trade.

The states, on the other hand, legislated freely throughout the entire range of transportation activities. Rates and charges, liabilities to travelers and shippers, accommodations of passengers and crew, the management of vehicles on land and vessels on the water, pilot qualifications and licenses, wreck, salvage, logging—whatever in the business of interstate transportation interested the states they regulated and regulated as best suited their interests, just as variously as they dealt with purely intrastate movements and with just as little apparent consciousness of constitutional guilt. A tendency appears to have developed to leave to Congressional care the supervision of the terms and enforcement of shipping articles which, toward the end of the period, won judicial concurrence. Also toward the end of the period the states learned from the courts that they might not qualify or destroy the right of interstate and international shipping to enter their ports, although their right to regulate those connected with such shipping when they were physically within the state was fully reserved them. All contemporary legislation having to do with land travel, all that related to travel on interstate watercourses, all matters of rates and charges (except in the District), was state legislation.

Aside from the statutes and a trinity of cases, there were not enough intimations of constitutional doctrine to help much. What there were were confirmatory of the more extensive materials for inference afforded by the statutes. Those inferences each reader may draw as best him pleaseth.

MISSISSIPPI LAND DESCRIPTIONS*

Jack H. Ewing†

METHODS OF DESCRIPTION

A deed must so describe the land conveyed that it can be located and identified. As stated by our Supreme Court, every conveyance of land must define its identity and fix its locality.¹ This may be accomplished either by a complete description in the deed itself or by reference to some other instrument or document which, when consulted, furnishes a complete description.²

No particular method of describing land is required by law. There are numerous types of descriptions which are legally sufficient: reference, blanket, name or well-known designation, metes and bounds, courses and distances, streets and alleys, fractional designations, and part of tract, all of which are treated herein.

(1) Reference

It is not necessary that a complete description of the land be set out in the deed. It is sufficient if it refers for identification to some other instrument or document which affords a definite description of the land. Generally, such reference is made to a map, plat or survey, or another deed. Such a reference has the effect of incorporating the instrument referred to into the deed containing the reference.

While it has been held otherwise in some jurisdictions, it would seem that under the law of our State the reference must be to an instrument or document which is recorded. In one case the Court held that a tax deed referring to Lot 17 in SE¼ of SW¼, Section 18, Township 7, Range 8 East, Lincoln County, was void because there was nothing of record to show that said forty was divided into lots, although it was shown, as a matter of fact, that the owner thereof had platted the same into lots for his own private purposes but had never filed the plat for record.³ In a later case, the Court upheld the validity of a deed describing land by reference to a survey which was not recorded, where it was shown that the courthouse had burned after the

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†Member of the firm of Satterfield, Ewing and Hedgepeth; Jackson, Mississippi.

¹*Wilkinson v. Davis' Adm'r.*, Freem. Ch. 53 (Miss. 1839).

²*Taylor v. Sayle*, 163 Miss. 822, 142 So. 3 (1932); *Patterson v. Morgan*, 161 Miss. 807, 138 So. 362 (1931); *Dunn v. Stratton*, 160 Miss. 1, 133 So. 140 (1931); *Bowers v. Andrews*, 52 Miss. 596 (1876).

³*Cassidy v. Hartman*, 93 Miss. 94, 46 So. 536 (1908).

date of such survey, saying it was fair to assume that such survey had been properly filed and recorded prior to the fire.⁴

Where the grantor attempts to incorporate both a complete description of the land and a reference to another instrument wherein it is described, and the attempted complete description is indefinite, it will be disregarded and the reference description will pass title to the land described in the instrument referred to.⁵

Where land is conveyed by reference to a recorded plat, the grantee takes his boundaries according to the plat, even though it was erroneously supposed that such boundaries coincided with other lines or calls or embraced different lands. Thus, where owners of adjoining lands plat them with reference to a certain line which they think is the section line, and convey them according to such plat, the boundaries fixed by such plat will not be disturbed, although it develops that the section line is not located as shown on such plat.⁶ And where a deed conveys by reference to a certain recorded plat embracing alphabetically numbered lots which are shown by said plat to be bounded on the east by Clarke's Creek, the Court will not permit the grantee to show that the field notes of said lots, when properly extended, would have made the plat, if properly drawn, take in land lying east of the Creek.⁷ Thus, where a grantor owned Lots 10 and 11 according to a recorded plat, and conveyed Lot 10, and he and his grantee thought a certain fence was on the line dividing the two lots, and acted according to such understanding, but the fence was in fact on Lot 11 and five feet away from the line dividing the two lots, the grantee takes only Lot 10 and not up to the fence.⁸

It is elementary that if conveyance is to be made by reference description, the reference must be such as will, when consulted, yield a complete description. If the instrument or document referred to contains an indefinite or inadequate description, the conveyance is void.

The following are reference descriptions which have been held valid by our Supreme Court: "the same land deeded to Emanuel Leake by C. G. Gallicott & Co. February 27, 1891";⁹ "S½ of N½, Lot 5, Block 113, Kamper & Whinnery No. 2," where there were two surveys of the same name, but only one of them had a lot and block corre-

⁴Pearce v. Tharpe, 118 Miss. 107, 79 So. 69 (1918).

⁵Leake v. Caffey, 19 So. 716 (Miss. 1896).

⁶Butler v. City of Vicksburg, 17 So. 605 (Miss. 1895).

⁷Haley v. Martin, 85 Miss. 698, 38 So. 699 (1905).

⁸Sea Food Co. v. Meyer, 144 Miss. 96, 109 So. 674 (1926).

⁹Leake v. Caffey, 19 So. 716 (Miss. 1896).

sponding to that called for;¹⁰ "Lots 37-39 in Moore's Addition to Town of Poplarville," where there was also a Second Moore's Addition containing same numbered lots;¹¹ "1 Lot in Sec. 8, T. 14, R. 8, desc. in bk. 199 Page 53 town of Glen Allen," the Court holding that this meant a lot in said section, township and range particularly described in Book 199 at page 53 of the records of deeds of Washington County, wherein said town is located;¹² "Lots 33, 34, 47 and 48 in Square 15 in Vick's enlargement of Vicksburg," where it was shown that the lots in Vick's enlargement of said city were numbered consecutively from 1 to 70, without regard to the subdivision into squares, and there could be only one lot of the same number in such enlargement, although the particular lots called for lay in Square 14 and not Square 15.¹³

The Court has rejected the following purported reference descriptions, holding them insufficient to pass title to any land: Lot 7 of a certain square in Woodville, according to a map which was recognized by citizens and officials, including the tax assessor, but which was never adopted by an order of the board of aldermen, and where the land in question was Lot 6 of said square according to the ancient division of the town;¹⁴ "Lot 38, except lots sold Russell, Gottschalk Survey, Section 8, Tp. 8, R. 11," where no map or plat of such survey could be found in the chancery clerk's office or elsewhere, and it did not appear whether the survey was private or public, nor what land had been sold to Russell, although proof was offered that the metes and bounds of said survey and its subdivision into lots were well known and recognized by the people residing in the "survey" and surrounding community;¹⁵ reference to an unrecorded private survey;¹⁶ reference to a call in an unrecorded deed.¹⁷

(2) Blanket

A blanket description, that is, one calling for all the property owned by the grantor in a certain subdivision, county or state, without particularly describing the property, is valid. This was so held by our Supreme Court as early as 1846 when it said that a conveyance by Thomas Bernard of "all my interest in real estate in the town of

¹⁰Standard Drug Co. v. Pierce, 111 Miss. 354, 71 So. 577 (1916).

¹¹Martin v. Smith, 140 Miss. 168, 105 So. 494 (1925).

¹²Tambure v. Standard Oil Co., 164 Miss. 386, 145 So. 107 (1933).

¹³Pegram v. Newman, 54 Miss. 612 (1877).

¹⁴Richter v. Beaumont, 67 Miss. 285, 7 So. 357 (1890).

¹⁵Boone v. Wells, 91 Miss. 799, 45 So. 571 (1908).

¹⁶Cassidy v. Hartman, 93 Miss. 94, 46 So. 536 (1908).

¹⁷O'Herrin v. Brooks, 67 Miss. 266, 6 So. 844 (1889).

Manchester (now Yazoo City) in the county of Yazoo and state afore-said" was not uncertain but operated as a conveyance of all the land that he owned in said town.¹⁸ And, by way of dictum, the Court said in 1873 that "if a contract purports to embrace all the land owned by the vendor in a certain county, it would be admissible to prove any and all land owned by him in that county."¹⁹

Likewise, a description calling for all property acquired by grantor from a certain source is sufficient without particularly describing the property derived from such source. Thus a conveyance of the grantor's "undivided interest in the estate both real and personal" of a deceased person late of a stated county, has been upheld as against the contention of uncertainty.²⁰ But a conveyance of "all our right, title, claim and interest in the tract of land belonging to Ransom P. Bunckley, deceased, situated in Franklin County, Mississippi," was declared ambiguous because:

This description points to nothing that would authorize extrinsic evidence to make it more definite. It is utterly destitute of data sufficient to identify the tract. What tract is meant? When did it belong to Ransom P. Bunckley? He might have had several tracts belonging to him at different times.²¹

This description would have been upheld, doubtless, if it had called for all the land belonging to Bunckley at his death, or if it had called for the grantor's interest in the estate of Bunckley. "All of the lands bequeathed to me by the will of my uncle, H. H. Barksdale, in Grenada County, Mississippi," is valid.²²

(3) Name or Well-known Designation

Where certain land has acquired a name by which it is generally known or by which it may be identified with certainty, it is sufficient in a conveyance of the land to describe it by such name. This is true though resort to extrinsic evidence may be necessary to show what was accurately included in the general description employed in the conveyance.

Descriptions of this type which have been upheld are: "that tract of land adjoining Section 9, and known as the Phil Allen Place, containing 80 acres, more or less;"²³ "real estate known as St. Albans in

¹⁸*Harmon v. James*, 7 Smedes & M. (15 Miss.) 111 (1846).

¹⁹*Holmes v. Evans and Monahan*, 48 Miss. 247, 12 Am.Rep. 372 (1873).

²⁰*Stewart v. Cage*, 59 Miss. 558 (1882).

²¹*Bunckley v. Jones*, 79 Miss. 1, 29 So. 1000 (1901).

²²*Barksdale v. Barksdale*, 92 Miss. 166, 45 So. 615 (1907).

²³*Raines v. Baird*, 84 Miss. 807, 37 So. 458 (1904).

Claiborne County, state of Mississippi;”²⁴ “I. P. Beasley Old Home Place,” although it was further described as being bounded on all sides by lands of named owners;²⁵ “plantation in Holmes County known as Wanalaw;”²⁶ “160 acres known as Vaughn tract and Price tract containing 260 acres in Lee County,” if it can be shown by extrinsic evidence what lands are embraced within said tracts;²⁷ “Commencement Plantation, consisting of 1330 acres.”²⁸

(4) Metes and Bounds

Land is often conveyed by describing it according to metes and bounds. This may be done by reference to natural or artificial boundaries, such as a stream or highway, or to land of an adjoining owner. Metes and bounds descriptions are common in those areas where sections are based on British, Spanish and French grants rather than U. S. Government survey, and are therefore of irregular shape, making description by part of or fractional section impracticable. This is particularly true in Claiborne, Jefferson, Adams and Wilkinson Counties.

As early as 1837, our Court held valid a description reading “All that tract, or parcel of land, containing 240 acres, situate, lying and being in the county of Wilkinson, on the Bayou Sarah waters, bounded on the north by lands of Reuben Dunham, east by lands of said Patrick Foley, south by lands of said John F. Carmichael, and west by the west branch of Bayou Sarah Creek.”²⁹

A description in a tax deed reading “a lot bounded East by N. Pitre, north by Fireman’s Hall, south by Washington Street, west by Lamense Street, in township 7, range 9, except a lot sold to Zuberbier & Behan” was upheld, although said lot did not adjoin Lamense Street but was separated therefrom by the lot sold off, the Court saying that where a deed correctly describes a lot as to its boundaries on three sides, the misnomer of a street on the fourth side is immaterial.³⁰

“About 2½ acres lying SW¼” of a specified quarter section, bounded by “W. H. Stinson’s line on the South, the Meridian and Enterprise public road on the east, John Stinson’s land on the west, and Henry Bynum’s fence on the north” was held sufficient in a suit to confirm title thereto.³¹

²⁴*Dochterman v. Marshall*, 92 Miss. 747, 46 So. 542 (1908).

²⁵*Beasley v. Beasley*, 177 Miss. 522, 171 So. 680 (1937).

²⁶*Eggleston v. Watson*, 53 Miss. 339 (1876).

²⁷*Tucker v. Field*, 51 Miss. 191 (1875).

²⁸*Vaughan v. Swayzie*, 56 Miss. 704 (1879).

²⁹*Carmichael v. Foley*, 1 How. (2 Miss.) 591 (1837).

³⁰*Lochte v. Austin*, 69 Miss. 271, 13 So. 838 (1891).

³¹*Bynum v. Stinson*, 81 Miss. 25, 32 So. 910 (1902).

A description of land as "a tract bounded on the East by the H. C. Simmons lands and the Montpelier and West Point highway, on the West by the Bail and A. O. Cliett lands, on the North by the Montpelier and West Point highway and H. C. Simmons land on the South by W. D. Simmons land" was held to be definite, where in addition, it was further designated as "the I. P. Beasley old home place" and a further description by designation as parts of certain sections in a given township and range, i.e., "part of N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Section 13, Township 16, Range 3 East, containing 32 acres," was attempted but was void for uncertainty.³²

Of course, a metes and bounds description must bound the land on all sides or contain sufficient indicia from which boundaries may be identified. Our Court, in an 1839 case, held void a conveyance of "173 acres of land on the west side of Biloxi Bay on the sea shore, in the county of Jackson", saying that the whole sea coast of Jackson County extended forty or fifty miles, and thus the one and only boundary given by the deed was so extensive that the deed afforded nothing to direct the mind to any particular place, or even to a particular neighborhood.³³

In a 1927 case the Court had before it a deed calling for "140 acres in the south part of Section 31, Township 5, of Range 3 West, lying South of the Raymond and Port Gibson road, and bounded on the East by land of J. R. Bryant." It was contended that this was a void description because there was more than 140 acres of land south of said road and west of the Bryant land in said section, and that only one boundary, viz., the J. R. Bryant lands, was given. The Court held the description valid, saying that there were three definite boundaries afforded by the deed, viz., the said road on the North, the J. R. Bryant lands on the East, and the section line on the South, and that the West boundary could be easily established by running from the J. R. Bryant lands and between the road and section line for a sufficient distance to take in 140 acres.³⁴

In one case, our Court held that a description by metes and bounds controlled, the grantee taking only the land within the boundaries, being actually only 17.3 acres, as found by later survey, although the deed itself recited it was a conveyance of 31 acres in the east side of a certain lot owned by the grantor. In this case the boun-

³²Beasley v. Beasley, 177 Miss. 522, 171 So. 680 (1937).

³³Doe ex dem Holley v. Curtis, 3 How. (4 Miss.) 230 (1839).

³⁴Herod v. Robinson, 149 Miss. 354, 115 So. 40 (1927).

daries had been pointed out to the grantee before sale and the Court said that he actually visualized what he was getting and the acreage was immaterial.³⁵

(5) Courses and Distances

This is one of the oldest methods of describing land. It is done by designating some definite point as a place of beginning and then describing a boundary line running from that point to another, then the next boundary running from the latter point to another, and so on, ending with a return to the starting point.

Of prime importance is a definite point of beginning. It goes without saying that if no starting point is designated with certainty, the entire description is a nullity. An early case before our Court presented the question of validity of a courses and distances description which described the land as "beginning at the southwest corner of land of Lieutenant Rapp." In overruling the contention that this was not a definite starting point the Court said:

That is certain which may be rendered certain. It was only necessary to ascertain the southwest corner of Rapp's land, to fix the boundaries, by survey of the entire tract. His corner was a fact, if true, which might be ascertained in the usual mode of ascertaining boundaries, either by direct proof or common reputation. Of course, as the certainty in the description of the land depends upon ascertaining the place of departure, it must follow that if this cannot be done with reasonable certainty, the land cannot now be ascertained, though it may have been capable of identity at the time the deed was executed. The deed is not void for uncertainty, though it may be impossible at this late date to identify the lands embraced in it.³⁶

In a somewhat recent case the Court held void a description reading as follows: "Commencing at the NE corner of Sec. 3, T. 10, R. 6 W., and run $54\frac{1}{4}$ chains to the place of beginning, thence South 10 chains, West 20 chains, North 10 chains to base line, east on base line to place of beginning." It requires but a glance at this description to note wherein it is deficient—the place of beginning is a definite distance from a definite section corner, but in what direction?³⁷

A description by courses and distances must completely enclose the land; where a tract clearly has more boundaries than are defined, the description is a nullity. Such was held as to a description de-

³⁵*Carrere v. Johnson*, 149 Miss. 105, 115 So. 196 (1928).

³⁶*Nixon v. Porter*, 34 Miss. 697, 69 Am. Dec. 408 (1858).

³⁷*Calvert v. Mathers*, 149 Miss. 671, 115 So. 780 (1928).

scribing only two boundaries of what was contended to be a parallelogram. The Court said, "When we get to the end of the 2,087 foot line, we are left in a wilderness. In other words, a surveyor would ask, 'Where do we go from here?' The question cannot be answered . . . it [the description] only describes two lines, and does not close."³⁸

Not only must all the boundary lines be stated, but they must be stated with such definiteness as to direction and distance that a surveyor may follow them and in so doing, terminate his survey where he started, after having followed a complete perimeter or enclosure of the lands. This does not mean, however, that a description is void where, although there is an omission of course or distance, the facts regarding the same are obvious. For instance, our Court upheld the following description:

Beginning 110 yards East and 294 yards South of NW corner of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 23, T. 1, R. 13 E., and running thence 70 yards along the Vossburg & Shubuta public road, thence South 70 yards, thence West 70 yards, thence North along Vossburg & Stafford Springs road 70 yards to place of beginning.³⁹

It is patent from the very face of this description that the direction of the first call is east, and that the last call terminates at the designated point of beginning, and all that a surveyor would need to do is to run a reverse-traverse, that is, backwards, or running from the given point of beginning south along the Vossburg & Stafford Springs road 70 yards, thence east 70 yards, thence north to the Vossburg & Shubuta road, and thence, obviously, in order to return to the starting point, west to such point of beginning. As the Court pointed out, the description is valid for the reason that the yards and directions are given for each of the other three sides and the description returns to the point of beginning.

It is not always necessary that the actual distance of a boundary be stated. There are countless cases where the line is defined as running, rather than a certain distance, to a certain monument, point or object, such as a creek, road, boundary or corner. Likewise, the actual course need not always be stated. Many times it is recited as a fence, wall, creek or other adjoiner. In such a case, however, the direction, that is, whether northerly, southerly, or the like, should be given so that the opposite direction will not be mistaken.

³⁸Patterson v. Morgan, 161 Miss. 807, 138 So. 362 (1931).

³⁹McLendon v. Raviesies, 178 Miss. 428, 173 So. 303 (1937).

(6) Streets and Alleys

While in some jurisdictions it appears an established and approved practice to convey property within a municipality by reference to a numbered house on a designated street, such as "1066 Wilson Street," of such city or town, such practice appears to have been rarely followed in Mississippi. Generally, conveyance of such property is accomplished by reference to plat or survey of the municipality or some subdivision thereof, such as "Lot 8, Block 12, Meadowbrook Subdivision, in the City of Brookhaven, Lincoln County, Mississippi, according to the map or plat thereof on record in the office of the Chancery Clerk of said County."

In one case, a description in a tax deed reading "House & Lot, W. side of Union St., No. 40, between State & Washington, City of Natchez, assessed to Est. C. Lacroze," was upheld in a suit to confirm title thereto. Unfortunately, the Court so held without discussion, saying merely that "the description of the land was not void." Whether the Court interpolated the description to read 40 Union Street and, if so, whether this was the decisive factor or not is speculative.⁴⁰

In a 1925 case, the Court had before it a boundary dispute between owners living, respectively, at 918 and 920 Speed Street, in the City of Vicksburg. They acquired from a common grantor. The owner residing at 920 Speed Street received the earlier deed. It conveyed by courses and distances a lot 27 feet east and west on Speed Street by 68 feet 9 inches north and south on Lake Street, and this description was followed by the further language: "The property hereby conveyed being the house and lot on Speed Street numbered 920." Thereafter the owner residing at 918 Speed Street received a deed calling for a 36½ feet frontage on Speed Street, followed by the language: "The property hereby conveyed being the house and lot on Speed Street No. 918". The residences were upon the lots when each deed was made. The controversy arose over the fact that there was not enough total frontage to give the two owners the frontage called for in their deeds, and an overlap resulted when the properties were considered from a frontage aspect. The owner of the property at 918 Speed Street contended that he was entitled to 36½ front feet on Speed Street, although this carried him beyond the actual lot associated with the property when considered according to house number, and under the very eaves of the other owner, and cut down the frontage of such

⁴⁰*Strauss v. McAllister*, 5 So. 625 (Miss. 1889).

other owner by five feet. The Court held that the general description, that is, the description according to house and lot number on Speed Street, controlled over the particular description showing certain frontage, and admitted parol evidence to show what was commonly understood by such general description. This case at least gives some weight to a description by street number.⁴¹

(7) Fractional Designation

This method of description is most often used by conveyances. Sections of the government survey are for the most part regular, that is, in square or rectangular form, or nearly so, and are easily subdivisible into fractional parts. This produces descriptions of simple form and capable of being extended to any practicable limit. Of course, the smaller the tract, the longer the description, when this mode of description is employed.

Our Court has said that in describing land by fractional designation, the viewpoint or basis for directions is the center of the section, or lesser subdivision sought to be divided. Thus the NE $\frac{1}{4}$ of a regular section, that is, one in the form of a square, embraces all that land in the section lying east of a north and south line and north of an east and west line where such lines are drawn to run from the section boundaries, and parallel thereto, extending through the center of the section to the opposite boundaries thereof.⁴² The NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ would be identified by following the identical procedure but extending the process by subdividing the NE $\frac{1}{4}$ in the same manner, working from the center of the quarter section in the additional process.

The fact that the section may be in the form of a rectangle or parallelogram presents no difficulty, as the same formula is followed, and the boundaries of the subdivision will be parallel to the section boundaries, and thus rectangular or in the form of a parallelogram, as the case may be.⁴³

Using the center as the viewpoint or basis for delineation, the N $\frac{1}{2}$ of a section is found to be all that part of the section lying north of a line running from the west to the east boundary of the section, parallel to the north and south boundaries, and through the center of the section.

Our Court having held that the center of the section, or subdivision thereof sought to be divided, is the viewpoint or basis from which

⁴¹McManus v. Wilson, 138 Miss. 1, 102 So. 543 (1925).

⁴²Wilson v. Wilson, 97 Miss. 423, 52 So. 353 (1910).

⁴³Swan v. New England Mortgage Company, 75 Miss. 907, 23 So. 627 (1898).

fractional designations are to be made, it has further held that the NE $\frac{1}{2}$ of a section is a void description. In so doing, it said, in response to the contention that the NE $\frac{1}{2}$ of a section is that land in a section lying north and east of a diagonal line running straight from the southeast corner to the northwest corner of the section, that the very term NE $\frac{1}{2}$ necessarily imports that there should be nothing embraced in that description south of an east and west line through the center of the section and nothing west of a north and south line through the center of the section, and that to accept the contention to the contrary would give a triangle including part of the NW $\frac{1}{4}$ and part of the SE $\frac{1}{4}$ of the section. The Court further said that the NE $\frac{1}{2}$ of a section is an utterly void description, unknown both to popular understanding and surveying.⁴⁴ It is interesting to note that some jurisdictions, including Alabama, hold to the contrary, saying that such a description calls for a triangle consisting of the north and east boundaries of the section and a straight line running from the northwest corner to the southeast corner of the section.

Where a section is irregular, fractional designations may nevertheless be employed. In an early case, decided in 1877, our Court held valid a description of "N $\frac{1}{2}$ of Fractional Section 14," saying that in the public survey there are fractional sections, and their subdivisions are therefore fractional and may be conveyed by that designation.⁴⁵ A fractional section results from some irregularity in the lines, caused by a river, lake or other obstruction to a regular outline, or because, although square, it does not contain a full 640 acres, or because it lies along the line where two government surveys meet, or because a grant by a foreign government was not disturbed when the U. S. Government later surveyed the lands of the area but was made a section of such survey and given a section number therein. It would appear that where a fractional or irregular section is being dealt with, the fractional designation requires such platting of the section as to give the proportionate quantity within the boundaries laid off according to exact delineation as to direction. For instance, in determining the location of the N $\frac{1}{2}$ of a section of irregular shape, such as a rhombus, or a square except for one side which is a winding river or for some other reason irregular, a true east and west line should be established which will divide the section exactly in half, giving the identical acreage north of the line as is left south of it.

⁴⁴*Wilson v. Wilson*, 97 Miss. 423, 52 So. 353 (1910).

⁴⁵*Selden v. Coffee*, 55 Miss. 41 (1877).

Where a fractional designation is employed, followed by an erroneous recital as to acreage, the latter is disregarded. The fractional designation controls regardless of recital as to quantity. Thus, "N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Section 13, Township 16 North, Range 3 East, containing 32 acres," conveys the entire eighty acres, despite the recital of much less quantity.⁴⁶

(8) Part of Tract

Quite often it is not the tract or unit owned, but only a portion thereof, that the owner desires to convey. And because, quite as often, it is impossible or impracticable to convey by any other method of description, the description employed is that which undertakes to identify and locate the particular portion sought to be conveyed within the larger tract or unit. And, because of lack of painstaking care on the part of the conveyancer, it is not uncommon for the conveyance to fail of its purpose to describe with certainty and exactness the lesser part of the whole which is intended to be conveyed. As a result of loose conveyancing, the deed is void where the part of the larger tract or unit is not definitely identified and located.

Common examples of such indefinite descriptions are the following which have been held void by our Court (In each case the section, township, range, county and state properly appear in the deed, the ambiguity appearing as to the description within the section or subdivision thereof): "fractional part of SW $\frac{1}{4}$ of SW $\frac{1}{4}$, containing 35 acres more or less";⁴⁷ "part of SE $\frac{1}{4}$ of Section 5";⁴⁸ "north part of SW $\frac{1}{4}$ of Lot 2";⁴⁹ "148 acres in Lots 2 and 3," where survey showed said lots contained an aggregate of 148.74 acres;⁵⁰ "37 acres in N $\frac{1}{2}$ of Section 1";⁵¹ "part of Deer Park, 120 acres";⁵² "pt. Sec. 28, tp. 12 R. 3 S., 5 acres, pt. Sec. 29, tp. 12 R. 12 E, 100 acres, and pt. Sec. 30, tp. 12 R. 12 E., 29 acres";⁵³ "412 acres in" a tract described by metes and bounds shown to contain a much larger acreage.⁵⁴

The above decisions condemn a practice that is all too common on the part of conveyancers, when intending to convey that part of a sub-

⁴⁶*Beasley v. Beasley*, 177 Miss. 522, 171 So. 680 (1937).

⁴⁷*Delk v. Hubbard*, 153 Miss. 869, 121 So. 845 (1929).

⁴⁸*Tierney v. Brown*, 65 Miss. 563, 5 So. 104 (1888).

⁴⁹*Lazar v. Caston*, 67 Miss. 275, 7 So. 321 (1890).

⁵⁰*Crosby Lumber and Mfg. Co. v. Elsas*, 183 Miss. 107, 183 So. 499 (1938). See also *Smith v. Hickman*, 24 So. 973 (Miss. 1899).

⁵¹*Nelson v. Abernathy*, 74 Miss. 164, 21 So. 150 (1896). See also *Dingey v. Paxton*, 60 Miss. 1038 (1883).

⁵²*Ranson v. Young*, 176 Miss. 194, 168 So. 473 (1936).

⁵³*Myerkert v. Warrington*, 19 So.(2d) 433 (1944), opinion withdrawn on request, 198 Miss. 29, 20 So.(2d) 708 (1945).

⁵⁴*Swayze v. Dae ex dem McCrossin*, 13 Smedes & M.(21 Miss.) 317 (1849).

division lying a certain direction from a natural boundary, such as a river or road, and estimated to contain a certain quantity of land, of describing the same as so many acres lying in such direction from such boundary within such subdivision. As example of this is a description reading "ten acres lying East of Zion Hill Road in SE $\frac{1}{4}$ of SE $\frac{1}{4}$ ", of a designated section. If there are exactly ten acres, or less than ten acres, lying east of said road in said forty, the description is valid. But if it developed that there were more than ten acres the description would be void; it is noted that in the *Crosby* case⁵⁵ there were actually 148.74 acres, while the deed called for only 148 acres, and the Court held the description void, saying that it was impossible to ascertain therefrom which 148 acres of the 148.74 it was intended to be conveyed. Thus, when a conveyancer is attempting to describe land so situated, he should describe it as "all that part of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of the designated section lying East of Zion Hill road, the same containing ten acres, more or less," in the designated section, or similarly.

Where the word "part" is accompanied by appropriate language so as to indicate the location thereof, the description is sufficient. Our Court has so held in the following cases: "south part of Section 29, township 3, range 11, 80 acres," held to convey 80 acres in south part of section bounded on the north by an east and west line;⁵⁶ "107 acres in south part of SE $\frac{1}{4}$ of Section 22," held to convey the south 107 acres of the quarter section;⁵⁷ "13 acres off north end of W $\frac{1}{2}$ of SW $\frac{1}{4}$," held to convey north 13 acres of the eighty;⁵⁸ "S. Fr. SE $\frac{1}{4}$, 33 acres," held to designate without ambiguity a strip along the south side of the quarter section extending north such distance as will compose 33 acres;⁵⁹ "222 $\frac{1}{2}$ acres off south and west part of S $\frac{1}{2}$ of Section 24," held to convey 222 $\frac{1}{2}$ acres to be laid off in a strip of equal depth on southern and western boundaries of the half section, which lines are by the description made the base lines for the survey;⁶⁰ 140 acres in south part of Section 31 lying south of a certain road and bounded on the east by lands of another;⁶¹ "fractional northwest corner of SW $\frac{1}{4}$ containing 33 acres," in a given section, held to describe such part of SW $\frac{1}{4}$ as was included between lines drawn an

⁵⁵*Crosby Lumber and Mfg. Co. v. Elsas*, 183 Miss. 107, 183 So. 499 (1938).

⁵⁶*Webb v. M. & O. R. Co.*, 105 Miss. 175, 62 So. 168 (1913). See also *Tierney v. Brown*, 65 Miss. 563, 5 So. 104 (1888); *McCready v. Lansdale*, 58 Miss. 877 (1881).

⁵⁷*Enochs v. Miller*, 60 Miss. 19 (1882). See also *Herring v. Moses*, 71 Miss. 620, 14 So. 437 (1894); *Beasley v. Beasley*, 177 Miss. 522, 171 So. 680 (1937).

⁵⁸*Bowers v. Chambers*, 53 Miss. 259 (1876).

⁵⁹*Woods v. Linder*, 194 Miss. 226, 11 So.(2d) 900 (1943).

⁶⁰*Goodbar & Co. v. Dunn*, 61 Miss. 618 (1884).

⁶¹*Herod v. Robinson*, 149 Miss. 354, 115 So. 40 (1927).

equal distance from the point of intersection of the lines bounding the quarter section at its northwest corner, and extending a sufficient distance to include 33 acres between parallel lines, with the word "fractional" held to be surplusage;⁶² "15 acres, more or less, off southwest corner of NE $\frac{1}{4}$," held to mean 15 acres in the form of a square in southwest corner of NE $\frac{1}{4}$, and not 15 acres off the west end S $\frac{1}{2}$ of NE $\frac{1}{4}$, and further held that the words "more or less" signified 15 acres in gross;⁶³ "14 acres off northeast corner of E $\frac{1}{2}$," held to convey from the corner as a base point from which two sides of the land conveyed extend an equal distance, so as to include, by parallel lines, the quantity conveyed.⁶⁴

A frequent pitfall of conveyances is to designate the land as a certain number of acres in a certain corner of the section or subdivision when the land intended to be conveyed is of irregular shape. Such designation should never be used unless the land to be conveyed is in the form of a square or parallelogram, all sides of which are of equal length and two sides of which are boundaries of the section or subdivision.

Where a grantor conveys a certain number of acres off a designated side of a tract but does not own land entirely across such side, he is held to convey the specified number of acres off the side of that part of the tract which he actually owns. For instance, a description of four acres off the North end of SW $\frac{1}{4}$ of SW $\frac{1}{4}$, of a certain section, where the grantor owned only land lying West of a road in said forty, was held by the Court to be a conveyance of four acres off the North side of that part of the forty lying west of said road.⁶⁵

An illustration of careless draftsmanship is found in the description calling for that part of a designated section bounded by a line running from the northeast corner to the southwest corner of the section, without further description to show whether the part of the section intended to be conveyed lay northwest or southeast of the diagonal line. This, of course, was held to be a void description.⁶⁶

Under a conveyance of an undivided number of acres in a tract containing a larger acreage, the grantee takes an undivided interest in the whole tract, and such interest is measured by the proportion

⁶²*Swan v. New England Mortgage Security Co.*, 75 Miss. 907, 23 So. 627 (1898).

⁶³*Early v. Long*, 89 Miss. 285, 42 So. 348 (1906).

⁶⁴*Bowers v. Chambers*, 53 Miss. 259 (1876).

⁶⁵*Harris v. Byers*, 112 Miss. 651, 73 So. 614 (1916).

⁶⁶*Plenny v. Ferrill*, 11 So. 6. (Miss. 1892).

which the number of acres conveyed bears to the whole number of acres in the tract. For instance, a deed calling for an undivided 300 acres in a tract containing 600 acres vests in the grantee title to an undivided 300/600 or one-half of the tract and makes him a tenant in common with the owner of the remaining undivided interest.⁶⁷

MISCELLANEOUS

(1) Exceptions

A description is valid even though it contains an indefinite exception. In such a case, it is the exception and not the grant that is void, and the deed conveys all land owned by the grantor in the tract described, as if the exception were not mentioned. For example, "N $\frac{1}{2}$ less six acres of Section 14" passes title to all of the N $\frac{1}{2}$ of Section 14 which the grantor owned.⁶⁸

Where land is intended to be excepted it should be described with the care and certainty necessary for the conveyance of it. Any of the methods of describing land for purposes of granting land is sufficient for the description for purposes of exception.

(2) Omissions

An omission will not be considered fatal if the description can be ascertained from the instrument as a whole or from what is given when the same is implemented by facts and circumstances which the court considers properly admissible.

Thus, a deed of trust was upheld where the description of the mortgaged premises read "Lot 36, Town of Webb, Mississippi," omitting the county, and the instrument was shown to have been acknowledged, filed and recorded in the county in which the town of Webb is situated.⁶⁹

A tax deed conveying land by description which was perfect except for failure to name the county in which the land lay was upheld, the Court saying that it would judicially know that the tax collector executing the deed could sell and convey lands situated only in the county of which he was an officer.⁷⁰ It was also held that "W $\frac{1}{2}$ of SE $\frac{1}{4}$ " of a designated section conveyed the entire eighty, although the deed described it as lying in Issaquena County only while, in fact,

⁶⁷Hodge v. Bennett, 78 Miss. 868, 29 So. 766 (1901).

⁶⁸McAllister v. Honea, 71 Miss. 256, 14 So. 264 (1893).

⁶⁹Wilkinson v. Webb, 75 Miss. 403, 23 So. 180 (1897).

⁷⁰Lewis v. Seibles, 65 Miss. 251, 3 So. 652 (1887). See also Clark, *Tax Titles in Mississippi* (1946) 17 Miss.L.J. 372, 380.

seven acres of it lay in Sharkey County. The Court pointed out that while this was true as to a voluntary conveyance, it would not be true as to a tax deed, which would convey only that part of the subdivision situated in the county where the sale was made, since the tax collector could sell and convey only the land in his own county.⁷¹ In three other cases, the Court held that evidence aliunde was admissible to supply omission of both city and county.⁷²

"Lots 1, 2 and 3 in Block 40 of the Central Division on Second Street in Coahoma County, Mississippi," was not constructive notice that land was situated in the City of Clarksdale in said county, and "Lots 1, 2 and 3 of Central Division to City of Clarksdale," in said county, was not constructive notice that the land was in Block 40, the omission in each description being considered fatal.⁷³

A description reading, " $\frac{1}{2}$ of NE $\frac{1}{4}$ " was void and did not constitute constructive notice of grantor's intention to convey E $\frac{1}{2}$ of NE $\frac{1}{4}$ ".⁷⁴ "W $\frac{1}{2}$ NW $\frac{1}{4}$ " is valid, the Court saying that it is an almost universal practice to omit the word "of" in describing land by fractional designation.⁷⁵ "A lot and residence in Madison Station," followed by designation of county and state, was an obviously void description.⁷⁶

(3) Abbreviations

The courts take judicial notice of commonly used initials and abbreviations in descriptions of legal subdivisions of land. No citation of authority is necessary that "Co." means county, "S" means section, "T" means township, and "R" means range, or that "NW $\frac{1}{4}$ " means northwest quarter, and so on. "Miss." presumptively and necessarily means the state of Mississippi.⁷⁷ The cases are legion where our Court had before it some question of description, but where the use of initials and abbreviations in such descriptions was not even discussed, both bar and counsel accepting as universally true that they may be employed. They must, however, be initials and abbreviations of common usage.

Our Court has not passed upon the sufficiency of a description such as "NE of SE" as meaning NE $\frac{1}{4}$ of SE $\frac{1}{4}$, or "3-6-6" or "3, 6, 6"

⁷¹Morrison v. Casey, 82 Miss. 522, 34 So. 145 (1903).

⁷²Hanna v. Renfro, 32 Miss. 125 (1856); Dowling v. Reber, 65 Miss. 259, 3 So. 654 (1887); Gex v. Dill, 86 Miss. 10, 38 So. 193 (1905).

⁷³Sack v. Gilmer Dry Goods Co., 149 Miss. 296, 115 So. 339 (1927).

⁷⁴Simmons v. Hutchinson, 81 Miss. 351, 33 So. 21 (1902).

⁷⁵Moore v. Thomas, 95 Miss. 644, 48 So. 1025 (1909).

⁷⁶Bowers v. Andrews, 52 Miss. 596 (1876).

⁷⁷Wilkinson v. Webb, 75 Miss. 403, 23 So. 180 (1897).

meaning Section 3, Township 6, Range 6, but the general rule is found to be that they are valid when used in voluntary conveyances, but are meaningless in involuntary conveyances or proceedings *in in vitum*, such as tax sales.

(4) Some Principles of Construction

Very often the Court is called upon to pass upon descriptions which are ambiguous or conflicting. Some principles of construction followed in such cases are as follows:

(a) In construing a description the court must effectuate the intention of the parties. Thus where the description designated the land particularly described as being a part of Section 21, and this description clearly identified land when applied to an old survey, but was irreconcilable when applied to a later survey containing a section numbered 21, both of which surveys were in existence when the deed was made, the Court said that it was manifestly impossible for the grantor to have intended to convey with respect to the latter survey, but that it was obviously his intention to convey according to the earlier survey.⁷⁸ In this case the Court further announced as principles of construction that no item included as part of the description in a deed should be rejected as erroneous or varied so long as it is reasonably possible to make all items harmonize; that parts of a deed which are more certain as descriptive items will interpret less certain items; that when it is necessary in order to harmonize all items of a deed, more certain items will, if reasonably possible, draw to themselves less certain items; that if any item of a deed must be rejected as impossible, or varied as erroneous, the item which is less certain and about which it is more probable that grantor was mistaken will be rejected or varied; and that where succeeding calls are readily ascertained and are as little liable to mistake, they are of equal dignity with, and may control, the first.

(b) The intention of the parties must be found in the language of the instrument and effect must be given to all of such language. Thus where a deed to a railroad company conveys a right-of-way over grantor's land and then there is a separate item describing the land, the Court held that the right-of-way over the land, not the land itself, was conveyed.⁷⁹

(c) A call for natural or artificial monuments will prevail over courses and distances. Thus where a deed calls for the conveyance of

⁷⁸*Dunn v. Stratton*, 160 Miss. 1, 133 So. 140 (1931).

⁷⁹*G. & S. I. R. Co. v. Patten*, 180 Miss. 756, 178 So. 468 (1938).

a parcel of land described as beginning at a point on the north side of Peace Street at a stake on the west side of the Central Railroad, where said street crosses said railroad, and thence running west with said street 150 feet, thence north 300 feet to Franklin Street, thence east 150 feet to the railroad, thence south with the railroad to the point of beginning, it was held that Franklin Street constituted the north boundary of the land conveyed, although Franklin Street was only 258 feet north of Peace Street, and the grantee did not acquire land of the grantor lying north of Franklin Street sufficient to give him a depth of 300 feet.⁸⁰

(d) Quantity yields to the remainder of the description. Thus where the deed calls for " $W\frac{1}{2}$ of $NW\frac{1}{4}$ less railroad right-of-way, containing 45 acres," the grantee takes all of the eighty less the right-of-way, although the quantity is considerably more than 45 acres.⁸¹

(e) The words "more or less" following a designation of a number of acres do not render a description void. Such words are ordinarily disregarded.⁸² Thus "24 acres more or less, off North end" is held to convey 24 acres off the north end.⁸³

(f) Where there are sufficient descriptive words to identify the property, improper or superfluous words will be rejected. Thus where a deed calls for a certain lot in Square 15 of a certain subdivision, and the lot is, in fact, in Square 14, but the lots in the subdivision are numbered from 1 to 70 without regard to squares, and there is only one lot bearing a designated number in the subdivision, the erroneous designation of the number of the square will be rejected as improper and superfluous.⁸⁴ Also, where the description reads "Sec. 1, T. 6, R. 13, of $NE\frac{1}{4}$ of $NW\frac{1}{4}$ and $NW\frac{1}{4}$ of $NE\frac{1}{4}$ of Sec. 1, R. 6, T. 13," and there is neither township 13 nor Range 6 in the county, the latter will be rejected, and the remainder, though irregular, will be considered sufficient.⁸⁵

(g) Where there are a general description and a particular description, the particular will control, unless a contrary intention appears. Thus, where the first clause in a description called for "31 acres in East side of Lot 7" and a second clause particularly described the land by metes and bounds, the particular, or metes and bounds, de-

⁸⁰*Potts v. Canton Cotton Compress & Warehouse Co.*, 70 Miss. 462, 12 So. 147 (1892).

⁸¹*Austin v. Sullivan*, 135 Miss. 741, 100 So. 275 (1924).

⁸²*Early v. Long*, 89 Miss. 285, 42 So. 348 (1906).

⁸³*Lovejoy v. McKibben*, 113 Miss. 369, 74 So. 281 (1917).

⁸⁴*Pegram v. Newman*, 54 Miss. 612 (1877).

⁸⁵*Ladnier v. Cuevas*, 138 Miss. 502, 103 So. 217 (1925).

scription controlled, although it contained only 17.3 acres.⁸⁶ And where a will devised all the land owned by the testator, and then described it as being a certain lot, the testator was held to have received only the particularly described lot, although it was shown that the testator also owned another lot.⁸⁷

The general description controls when it is apparently so intended. Thus a conveyance by the grantor of all the lands bequeathed to him by a certain uncle, followed by the words "being in Grenada County and known as the Minter place," was held to be a grant of all land in said county received by the grantor under his uncle's will, and not limited to the Minter place only, the court holding that this construction comported with the obvious intention of the parties, and that the words "known as the Minter place" constituted nothing save a mere participial phrase carelessly thrown in as a re-description, not a new grant.⁸⁸ And where a deed called for the plantation known as "St. Albans" followed by a particular description by land numbers which failed to include all of "St. Albans," the Court held that it seemed to be the plain intent of the vendor to convey the entire plantation and thus he would be deemed to have done so.⁸⁹

In another such case the Court held that a conveyance by a grantor of "all her interest in Haynes Bluff Plantation . . . said interest having been acquired by grantor under the will of Nancy Hamilton" passed title to all grantor's interest in said plantation, including an additional interest therein that she did not acquire under said will, the Court saying that the general grant of all interest owned by the grantor manifested her intention.⁹⁰

(h) U. S. Government surveys control. Private surveys must observe government corners and boundaries.⁹¹

(5) "Cover-all Clause"

This clause usually follows the particular description and reads in the following or similar language, to-wit: "it being the purpose and intent of the lessor herein to lease, and he does hereby lease, all of the land owned or claimed by said lessor in the above mentioned section or sections, or sections adjacent thereto, whether correctly de-

⁸⁶Carrere v. Johnson, 149 Miss. 105, 115 So. 196 (1928).

⁸⁷Keeley v. Adams, 149 Miss. 201, 115 So. 344 (1928).

⁸⁸Barksdale v. Barksdale, 92 Miss. 166, 45 So. 615 (1907).

⁸⁹Dochterman v. Marshall, 92 Miss. 747, 46 So. 542 (1908).

⁹⁰Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922).

⁹¹Buckwalter Lbr. Co. v. Wright, 159 Miss. 470, 132 So. 443 (1930).

scribed herein or not, and in event of error in said lease lessor agrees to execute a correction lease if requested by lessee, or his assigns."

There are a number of principles which enter into a consideration of the meaning of the cover-all clause, namely: (a) A grantor may convey by general or blanket description calling for all his property in a state, county, town or other designated area; (b) The court must effectuate the intention of the parties, to be gathered from the language used, considering the description as a whole, seeking to harmonize all items; (c) A particular description controls, unless the contrary intention appears. It would seem from these principles that the intention of the parties is the decisive factor, such intention to be ascertained from the particular instrument under consideration.

In an oil and gas lease there is always a recital that the leased premises contain a certain number of acres, more or less. This recital of quantity is the basis for determining the amount of annual delay rental and is often the basis for determining fractional mineral and royalty interests. It would, therefore, seem to be the intention of the parties for the instrument to cover approximately the number of acres set out therein.

It is also commonly known that one of the purposes of the cover-all clause is to gather into the description small strips or areas forming a part of the tract as a whole, not a part of the lands particularly described, but adjacent thereto, the reason for their not being particularly described being that a particular description of them is not available but, in most cases, dependent upon a survey. For instance, very often a fence supposedly enclosing the particularly described lands will not be exactly on the boundary line, but will take in an additional and adjacent strip or parcel, title to which has been acquired by adverse possession by the owner of the particularly described land. Another purpose of the cover-all clause is to cover the property by general description where the particular description is ambiguous, incorrect or defective. It would seem that these purposes would be upheld as the intention of the parties. However, it is doubtful that the Court would apply the cover-all clause to a comparatively large quantity of land, especially where it is not considered a part of a single unit or tract of which the particularly described land forms the other part.

In a recent case the Court construed a lease covering particularly described lands recited to contain 155 acres, more or less, and containing a cover-all clause.⁹² A part of the land particularly described

⁹²Cummings v. Mid-States Oil Corp., 193 Miss. 675, 9 So.(2d) 648 (1942).

therein was SW $\frac{1}{4}$ of SW $\frac{1}{4}$ less ten acres off the west side, in a given section. The number of acres recited as being covered by the lease appeared to include ten acres more than the acreage of the lands particularly described. After execution of the lease, the lessor conveyed minerals or royalty by instruments which covered the same lands except that there was no exception of the ten acres, and which also contained a recital of 155 acres, and also a recital that all of said lands were subject to the lease. The lower court (Chancery Court of Yazoo County) held that the cover-all clause was valid, saying that the general intention clause controlled over the express exception and, furthermore, the cover-all clause contained words of conveyance and was more than a mere expression of intention. The Supreme Court affirmed the decision but said that it did so under the doctrine of estoppel, the lessor being estopped to deny that the lease covered the ten acres because of the recitals in mineral or royalty conveyance to the effect that all the land, including the ten acres, was covered by the lease, and all the instruments, including the lease, calling for the same number of acres.

IMPLIED COVENANTS IN OIL AND GAS LEASES*

H. P. Pressler, Jr.†

For a thorough understanding of implied covenants in oil and gas leases it is essential that one have a general understanding of (a) the manner in which oil and gas exist in the earth, (b) the distinction between limitations, conditions, and covenants, and (c) the basic provisions of the customary forms of oil and gas leases.

Oil is found in traps beneath the earth's surface. These traps are the result of some deformity such as folding, faulting or up-lifting of the sedimentary rocks in the earth's crust. These traps containing oil and gas accumulations are usually referred to as oil and gas pools. The oil and gas are held within the limits of the trap or pool by impervious formations above and below the formation in which the oil and gas are found. The oil and gas are usually underlaid by water. In an oil pool the gas is found in solution in the oil and frequently overlies the oil in the form of a gas cap. The oil and gas being fluid will migrate within the confines of the trap or pool.

In producing the oil and gas, the oil operator makes use of the reservoir energies furnished by the water drive, the dissolved gas drive and the gas cap drive. In the water drive, as the reservoir pressure is reduced, the oil and gas are displaced by the water pressing upward upon them. In the dissolved gas drive, the gas in solution in the oil escapes when the pressure is reduced and forces the oil from the sand. In the gas cap drive, oil is displaced by the expanding free gas in the gas cap which overlies the oil, and which expands as the pressure in the reservoir is reduced.

The production of oil and gas from a pool necessarily dissipates these reservoir energies. Therefore, if a tract of land overlying a pool is not developed timely, the reservoir energies may be dissipated by the operators of other tracts overlying the pool before development of the tract is accomplished, and the tract's fair share of the oil or gas in place thereunder may not be recovered. Because of the migratory character of oil and gas within the limits of the trap or pool, the failure to drill timely upon the tract will result in the oil and gas being drained therefrom by other wells in the field. Therefore, timely de-

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†LL.B., University of Texas; Attorney for Humble Oil & Refining Company; Editor of the Mineral Law Section of Texas Bar Journal; former Chairman of Mineral Section of State Bar of Texas; member Texas and Mississippi State Bars.

velopment of a lease and its protection from drainage are of great importance to the lessor who is entitled to royalties on production therefrom.

The distinction between limitations, conditions, and covenants are briefly as follows:

A *limitation* arises where in the creation of the estate its existence is so limited that the estate will ipso facto terminate upon the happening of certain contingencies.

A *condition* exists where the happening of the event does not ipso facto terminate the estate granted, but merely gives the right and option to the lessor to terminate the estate.

A *covenant* merely imposes upon the covenantee the obligation to perform a certain act or acts, and the failure to perform them does not terminate the estate ipso facto or give to the lessor the right and option to terminate the estate.¹ Under some circumstances hereafter referred to, a court will decree a cancellation of an oil and gas lease for the breach of a covenant.

In considering the basic provisions of the usual forms of oil and gas leases it is important for us to determine which provisions are limitations, which are conditions, and which are covenants. It is also important to determine what matters are covered by express covenants, as no implied covenant will ordinarily arise as to a matter covered by an express covenant in the lease. In *Lloyd's Estate v. Mullen Tractor & Equipment Co.*² the Mississippi Supreme Court said, "It is elementary that an express stipulation upon a matter excludes the possibility of an implication upon the same subject."

The form of the oil and gas leases in common use in Mississippi is known as the "unless form" lease and is also frequently referred to as the "Producer's 88 form." The various printed forms of "unless" leases differ somewhat in many of their special provisions, but their fundamental provisions are rather uniform. These leases grant to the lessee the right to explore, drill for and produce oil and gas. They are for a stipulated term of years, referred to as "primary term," and provide that they will continue in effect after the primary term so long as oil or gas is produced therefrom or operations for drilling or re-

¹Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.(2d) 27 (1929); Grubb v. McAfee, 109 Tex. 527, 212 S.W. 464 (1919). See Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas* (1930) 8 Tex.L.Rev. 483, for a very interesting discussion of these distinctions.

²192 Miss. 62, 4 So.(2d) 282 (1941).

working are conducted thereon. They further provide that if operations for drilling are not commenced within one year after the date of the lease, it will terminate unless rentals are paid, and authorize the deferment of drilling operations thereafter for successive twelve-month periods during the primary term by like rental payments. These leases also provide for the resumption of rental payment should a dry hole be drilled or production cease after it is once obtained.

The provisions of the leases just referred to constitute limitations upon the estate of the lessees. The leases terminate ipso facto at the end of the primary term in the absence of production or drilling or reworking operations in accordance with their terms. If drilling operations are not commenced thereon, the leases will terminate ipso facto on any anniversary date unless a rental is paid.

Another limitation upon the estate created by an oil and gas lease is recognized in Texas. The Texas theory is that the cessation of the use of the premises for the purposes for which they were leased terminates the lease. In other words, the lessee must devote the premises continuously to the purposes for which it was leased or the lease will terminate.³

It is most important that we do not confuse these limitations upon the leasehold estate with implied covenants. The distinction is fundamental and of vast importance to the rights of the parties to the lease.

These "unless" leases do not usually contain any conditions. There are some oil and gas leases which contain provisions requiring the lessee either to drill or pay rental and providing that the lessor may declare a forfeiture of the lease for failure so to do. Such provisions are held to be conditions giving to the lessor, upon the failure of the lessee to drill or pay rental, the option to declare the lease forfeited. The lessor can elect to waive the forfeiture provision and sue for the rent. These leases are illustrative of leases containing conditions subsequent⁴ and it is most important that the distinction between conditions subsequent and implied covenants be kept clearly in mind.

The "unless" lease usually contains a specific provision for drilling offset wells thereon to any well on adjacent land within a specified distance of the leased land and draining it. This provision

³Texas Co. v. Davis, 113 Tex. 321, 254 S.W. 304, 255 S.W. 601 (1923); Chapman v. Ellis, 254 S.W. 615 (Tex.Civ.App. 1923) (error dism. for want of jurisdiction). Also, see 3 SUMMERS, OIL AND GAS (Perm.ed.) § 453.

⁴See 2 SUMMERS, OIL AND GAS (Perm.ed.) §§ 332-36, for a discussion of these early form leases.

of the lease is classified as an *express covenant*. However, many "unless" leases contain no such express covenant.

Provision is made in all leases for the payment to the lessor of royalties, usually one-eighth of the production saved and marketed.

None of the usual "unless" lease forms contains specific provisions requiring the drilling of test wells, the development of the lease after the discovery of oil and gas, or the marketing of the products from the lease.

The absence of such express covenants is not due to the unwillingness of the lessee to contract expressly with reference to these matters, but is based upon the fact that conditions differ so radically in different oil and gas fields and the circumstances surrounding the development of different leases vary so vastly that it is for all practical purposes impossible to express in the lease the lessee's obligations concerning these matters. Leases are almost invariably acquired prior to the discovery and development of the pool and before a thorough knowledge of its characteristics is obtainable.

The courts have ruled that the main consideration to the lessor for his lease is the royalty which he expects to receive from its development. In view of this, and the usual absence of express covenants with reference to operations upon and development of oil and gas leases, and the nature of oil and gas in place in the earth, the courts have been diligent in protecting the lessor's interests under oil and gas leases, and it is well settled that an oil and gas lease imposes upon the lessee certain implied covenants or obligations with respect to operating and developing the premises and marketing the products therefrom *where there is no express covenant in the lease with reference thereto*.⁵

Professor Walker sums up these covenants in the following statement:

The sum total of these various implied covenants may be regarded as establishing the proposition that the lessee is under the implied duty to do everything that a reasonably prudent operator should do in operating, developing, and protecting the property so as to insure a reasonably rapid accrual of the largest royalties practicable, due consideration being given to the interests of both the lessor and lessee, so long, at

⁵Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas* (1933) 11 TEX.L.REV. 399, 400-401; 2 SUMMERS, OIL AND GAS (Perm.ed). § 395. Also, see Walker, *Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligations of the Lessee* (1941) 13 MISS.L.J. 292.

least, as there is no express clause in the lease relieving the lessee of this implied duty in any particular situation.⁶

These implied covenants have been classified in numerous ways by text writers.⁷ It seems to the writer that they should be divided into four classes as follows: (1) the covenant to test the land for oil and gas within a reasonable time; (2) the covenant to develop the lease with reasonable diligence after production is obtained; (3) the covenant to protect the land from drainage by the use of reasonable diligence in drilling offset wells; and (4) the covenant to use reasonable diligence in marketing the production.

The first classification of these implied covenants has no application to the ordinary "unless" form of lease, for here the parties have expressly contracted that drilling operations may be postponed by the payment of rentals, and the failure to commence operations within the primary term terminates the lease ipso facto as heretofore pointed out. Because of these express provisions, no implied covenant inconsistent therewith will be imposed upon the lessee.⁸

However, in some jurisdictions, namely Indiana and Kentucky, under lease forms requiring the lessee to drill or pay, the courts have held that there was an implied obligation to drill test wells within a reasonable time, and despite the specific provisions of the lease, the drilling of such test wells could not be indefinitely postponed by rental payment. Mississippi, Ohio, Oklahoma, and Texas, however, have refused to follow this doctrine, and it is in direct conflict with the general rule of construction which denies the implication of covenants in contradiction of the express provisions of the lease.⁹

The Indiana and Kentucky doctrine has been repudiated in Mississippi by a well-reasoned opinion of the Mississippi Supreme Court in the case of *Lloyd's Estate v. Mullen Tractor & Equipment Co.*¹⁰ The lease involved in that case was for a five-year term and as long thereafter as oil or gas is produced and contained a provision that no implied obligation for drilling during the primary term should be read into the lease. The lease provided that it would terminate at the expiration of the five-year term if no well had been commenced thereon unless a rental was paid. Thereafter the commencement of a well

⁶Walker, *supra* note 5, 11 TEX.L.REV. at 401.

⁷*Ibid.*; 2 SUMMERS, OIL AND GAS (Perm.ed.) § 396.

⁸*Lloyd's Estate v. Mullen Tractor & Equipment Co.*, 192 Miss. 62, 4 So.(2d) 282 (1941); 2 SUMMERS, OIL AND GAS (Perm.ed.) § 396.

⁹2 SUMMERS, OIL AND GAS (Perm.ed.) § 397.

¹⁰192 Miss. 62, 4 So.(2d) 282 (1941).

could be further deferred and the lease maintained perpetually by rental payments made annually. The lease contained an express provision for offsetting wells on adjoining lands. The Mississippi Supreme Court said:

. . . the Courts of Indiana and Kentucky have seen fit to relieve the lessor of the obligations of oil and gas leases which contain a provision for perpetual renewal and delay in drilling by the payment of rental, not because such a provision violates the rule against perpetuities, but on the theory of an implied covenant to develop the land for oil and gas within a reasonable time. Such relief has been granted, however, only after notice in advance to the lessee that the lessor will not accept further rental and a demand upon the lessee that drilling be commenced within a reasonable time. The appellee cites and relies upon a number of cases from those jurisdictions, and especially from Kentucky, . . . But the doctrine established by these cases, whereby a covenant on the part of the lessee to develop the land for oil and gas within a reasonable time is implied by the Court in contravention of an express covenant entitling the lessee to delay drilling a well by the payment of the annual rental stipulated for, is not only at variance with all other jurisdictions but apparently with all rules of construction of contracts generally.¹¹

However, it was said by a Texas Court of Civil Appeals in *Magnolia Petroleum Co. v. Page*¹² that "when a lease is silent as to the duty of the lessee to develop the lease and there is *no provision* for the payment of delay rentals in lieu of drilling or where the period . . . when delay rentals may be paid has expired, then there is an implied covenant requiring the lessee to use such diligence in drilling and developing the lease for oil and gas as a reasonably prudent operator would use under the same or similar circumstance."

It is now customary for leases to contain an express stipulation with reference to drilling of offset wells. For this reason, implied covenants falling within the third classification above seldom apply to leases in Mississippi. However, where there is no express covenant to protect the lease from drainage, the courts will imply one. The implied duty of the lessee to protect the lease from drainage is not an absolute duty. The lessee is not obligated to protect the lease from any and all drainage. If the well on the adjoining land is not producing in paying quantities, there is no implied duty upon the lessee to offset such well.

¹¹*Id.* at 80-81, 4 So.(2d) at 286-287.

¹²141 S.W.(2d) 691, 693 (Tex.Civ.App. 1940), error *ref'd*.

By "paying quantities" in this sense is meant in quantities sufficient to pay the cost of drilling and operating the well and a reasonable profit. Though the well on the adjoining tract may be producing in paying quantities as above defined, the lessee is not obligated to drill an offset well on his lease to protect it from drainage unless he, as a reasonably prudent operator, could reasonably expect to complete his offset well as a paying producer.¹³

Implied covenants coming under classifications (2) and (4) above, to-wit: the implied-covenant to develop reasonably the lease after production is obtained and the implied covenant to use reasonable diligence to market the production, arise under nearly all "unless" form oil and gas leases. Only infrequently do these leases expressly provide for the manner of development. The impracticability of including express provisions relating to this matter has been referred to earlier. The permeability and porosity of the oil and gas sands, the effectiveness of the water drive, the gas cap drive, or the dissolved gas drive are all pertinent to a determination of the number of wells necessary to develop reasonably the lease and to recover its fair share of the oil and gas in place. Necessarily, these factors cannot be known or ascertained at the time a lease is executed covering land not already within a developed pool. Therefore, express provisions with regard to the number of wells, the spacing thereof, the depth and the time within which they must be drilled would be "mere shots in the dark" likely to miss their targets by a wide margin.

There are, however, leases which specifically provide for the rate and manner of development. As heretofore stated, when express covenants are contained in the lease, no implied covenants arise. Some leases contain provisions to the effect that the lessee after discovery of oil or gas thereunder will develop them as a reasonably prudent operator would under the same or similar circumstances. This merely expresses the covenant which the courts will imply in the absence of an express covenant to that effect.

Some oil and gas leases contain express provisions to the effect that the lessee will use reasonable diligence in marketing the products from the lease, which also is nothing more than an expression of the covenant which the law will imply in the absence of an express provision. However, the question of marketing production involves so many conditions and situations that cannot be anticipated even from year to year after production is obtained, that it is unusual to en-

¹³² SUMMERS, OIL AND GAS (Perm.ed.) § 399.

counter leases in which an attempt is made to express the obligations of the lessee in marketing the production other than in most general terms, as, for example, leases requiring the lessee to market the lessor's royalty oil with the lessee's working interest oil. Many leases contain express provisions for the delivery of the lessor's royalty oil to him at the wells.

Therefore, under the ordinary "unless" form of oil and gas leases the covenants which are usually implied are the implied covenant to develop reasonably the land after production is obtained and the implied covenant to use reasonable diligence to market the production therefrom.

What is the standard of diligence to which the lessee must conform in performing these implied covenants? As in the case of the implied covenant to protect from drainage, the lessee is under no absolute duty or obligation. In most jurisdictions the law imposes upon the oil and gas lessee the duty to perform the implied covenants of the lease with the diligence of a reasonably prudent operator under the same or similar circumstances. The lessor's interest alone is not considered in determining whether or not the lessee has measured up to the standard of conduct required of him, but the interest of the lessee is also taken into consideration.¹⁴

The lessee is not required to drill wells which a reasonably prudent operator would not drill because the expectation of obtaining profitable production therefrom is too remote.¹⁵

In Pennsylvania, the standard of diligence only requires the lessee to act "in good faith on business judgment,"¹⁶ and this rule has been followed in Indiana and Arkansas.¹⁷

Since the decision of the Texas Supreme Court in *Grubb v. McAfee* and *Waggoner Estate v. Sigler Oil Company*,¹⁸ it is clear that in Texas the implied obligations to develop reasonably the lease and protect it from drainage and to market the production therefrom are covenants and

¹⁴*Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas*, 117 Tex. 439, 6 S.W.(2d) 1039 (1928); 2 SUMMERS, OIL AND GAS (Perm.ed) § 416, pp. 388, 389, 393, 394.

¹⁵*Armstrong v. Skelly Oil Co.*, 55 F.(2d) 1066 (C.C.A. 5th, 1932); Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas* (1933) 11 TEX.L.REV. 399.

¹⁶*Colgan v. Forest Oil Co.*, 194 Pa. 234, 45 A. 119 (1899).

¹⁷*Ezzeil v. Oil Associates, Inc.*, 180 Ark. 802, 22 S.W.(2d) 1015 (1930); *Manhattan Oil Co. v. Carrell*, 164 Ind. 526, 73 N.E. 1084 (1905).

¹⁸109 Tex. 527, 212 S.W. 464 (1919); 118 Tex. 509, 19 S.W.(2d) 27 (1929).

not conditions, and the lessor's usual remedy for a breach of the covenant is an action for damages "though under extraordinary circumstances—where there can be no other adequate relief—a court of equity will entertain an action to cancel the lease in whole or in part."¹⁹ Therefore, in Texas, it is only where facts are alleged and established which show the damage remedy at law is inadequate and unavailable and unusual circumstances are shown to justify the intervention of a court of equity that a decree for specific performance under penalty of cancellation in whole or in part will be entered.

In connection with the consideration of the lessor's remedies for the breach of these implied covenants it is most important that we keep in mind the distinction between a covenant and a limitation and a condition subsequent. If the provision of the lease not complied with is a limitation, the lease ipso facto terminates. If it be a condition subsequent, upon its breach, the lessor has an option to terminate the lease. If it be a covenant, the lessor may recover damages for its breach and under some conditions obtain a decree of cancellation or partial cancellation.

Summers in his work on *The Law of Oil and Gas*, in discussing the remedies of the lessor which result in total or partial cancellation of the lease, divides these remedies into three divisions. The first division includes the remedies of the lessor under leases expressly granting the right of forfeiture for the breach of an express or implied covenant. These are leases containing express conditions subsequent. The third division includes the remedies of the lessor where the express limitations of the lease have not been complied with. The second division includes remedies for the breach of implied covenants when the lease contains no express provision for forfeiture for the breach thereof.²⁰ In connection with this second division it is said that:

The second of these classifications was made on the basis that total or partial cancellation of leases are decreed by the courts, to some extent at least, on the ground that the lessee has breached the express and implied covenants of the lease to test and develop the land, to protect it from drainage, and to market the oil and gas produced thus preventing the receipt of royalties by the lessor, the principal consideration of the lease. The decrees of the courts in these cases for total or partial cancellation of leases are not enforcements of expressly reserved powers of forfeiture, for in none of the cases in this classification were such powers expressly reserved in

¹⁹Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.(2d) 27, 29 (1929).

²⁰2 SUMMERS, OIL AND GAS (Perm.ed.) § 431, pp. 401-2.

the leases. The cases in this group have been roughly divided into five classes, on the basis of the possible theories upon which the courts proceeded in decreeing a total or partial cancellation of the leases involved. The first of these theories is, that from continued breaches of express and implied covenants of the lease for testing and development and other circumstances, it may be found as a matter of fact that the lessee intended to abandon the lease. The second theory is, that the express and implied covenants of the lease for testing and development are conditions by implication for the breach of which the lessor may declare a forfeiture and secure enforcement thereof in a court of equity by a decree of cancellation, in other words, implied forfeiture. The third theory is, that the lessor's legal remedies for breaches of express and implied covenants of the lease for testing and development are inadequate, and on this basis a court of equity may decree a total or partial cancellation of the lease. The fourth theory is based upon a species of fraud. It involves a situation where a lessee operates adjoining tracts of land of different lessors and refuses to drill wells on one tract to prevent drainage by wells on the other tract. For the purpose of this discussion there is also included the Texas theory that the expressed or inferred purposes of the lease to use the land for oil and gas purposes creates an estate on limitation, so that a cessation of such use terminates the lease and gives the lessor the right to a judicial declaration of such termination through an equitable decree for cancellation or to quiet title.²¹

Of interest in this connection is the case of *Sauder v. Mid-Continent Petroleum Corporation*,²² in which the United States Supreme Court said that unless within a reasonable time exploratory wells were drilled by the lessee on the undeveloped portion of a producing lease to the horizon at which production had been found in other wells in the vicinity, then a decree should be entered cancelling the lease except as to the forty acres on which the two wells had been drilled.²³

In the writer's opinion the correct rule has been laid down by the Texas cases. A lease should not be cancelled for the breach of an implied covenant except under extraordinary circumstances when it is shown to a court of equity that there is no other adequate relief for the lessor.

In all jurisdictions the courts recognize the right of the lessor to recover damages for the breach of the implied covenants of the oil

²¹3 *id.* § 433.

²²292 U.S. 272, 54 S.Ct. 671, 78 L.Ed. 1255, 93 A.L.R. 454, *rehearing denied*, 292 U.S. 613, 54 S.Ct. 856, 78 L.Ed. 1472 (1934).

²³See 3 SUMMERS, OIL AND GAS (Perm.ed.) §§ 453-71, for an analysis of the cases on this subject in all oil and gas jurisdictions.

and gas lease.²⁴ The measure of damages recognized in most jurisdictions for the breach by the lessee of his implied obligation to develop the lease and market the production therefrom is the value of the lessor's royalty on the oil and gas which would have been produced had the lessee complied with the implied covenants.²⁵ There are statements in the cases to the effect that in order to prevent the lessee from paying double royalties he is entitled to credit for the royalties paid when he produces the oil,²⁶ but the author knows of no instance where such credit has actually been given. A West Virginia case proposes that the measure of damages should be the interest on the value of the royalty, as this more nearly approximates the true measure of damages. Professor Walker believes that such rule has real merit,²⁷ but Professor Summers states that an attempt to apply such rule will meet "insurmountable objections."²⁸ The Supreme Court of Texas has refused to apply the interest rule suggested by the West Virginia Court,²⁹ and it has not been followed in other jurisdictions.

Whether these implied covenants are implied in law or implied in fact has been the subject of comment by several text writers.³⁰ If the covenants are implied in law, the original lessee is not bound by contract but by privity of estate, and his liability for the implied covenants would terminate upon his assignment of the lease. If they are implied in fact, he is bound by privity of contract and would remain liable for the breach of the implied covenant though occurring after assignment. It seems safe to say that in Texas implied covenants are implied in fact.³¹ This also seems to be the rule in Kansas.³²

When a portion of a lease is assigned the question is likely to arise as to whether or not the implied covenants are divisible. There is little accord in the authorities on this question.³³ Professor Walker states:

²⁴2 *id.* § 433.

²⁵2 *id.* § 435.

²⁶*Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas*, 117 Tex. 439, 6 S.W.(2d) 1039 (1928); *Texas Pacific Coal & Oil Co. v. Barker*, 117 Tex. 418, 6 S.W.(2d) 1031 (1928).

²⁷Walker, *supra* note 15, at 429-430.

²⁸2 SUMMERS, OIL AND GAS (Perm.ed.) § 435, p. 437.

²⁹*Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas*, 117 Tex. 439, 6 S.W.(2d) 1039 (1928); *Texas Pacific Coal & Oil Co. v. Barker*, 117 Tex. 418, 6 S.W.(2d) 1031 (1928).

³⁰MILLS AND WILLINGHAM, LAW OF OIL AND GAS (1926) § 148; Walker, *supra* note 15, at 405-406, 450-452.

³¹*Texas Pacific Coal & Oil Co. v. Stuard*, 7 S.W.(2d) 878 (Tex.Civ.App. 1928), error *re'd.*

³²*Gillet v. Elmhurst Investment Co.*, 111 Kan. 755, 207 P. 843 (1922).

³³See 3 SUMMERS, OIL AND GAS (Perm.ed.) § 513, and Walker *supra* note 15, at 451-454, for an interesting discussion of this subject.

The obligations imposed by the implied covenants to protect against drainage, to use reasonable diligence in producing and marketing, and to use reasonable care in operating are all clearly severable. The nature of the obligations imposed by each of these covenants is necessarily of a localized character, and each assignee separately is responsible for breaches occurring on his particular part of the leased premises. The implied covenant to develop with reasonable diligence, on the other hand, pertains to the general development of the entire premises. Notwithstanding, in the recent case of *Cosden Oil Co. v. Scarborough*³⁴ it was held that the obligations imposed by this implied covenant are also severable as to the various assignees, and each holder of a segregated part is obligated to develop his part with reasonable diligence without regard to the development work being prosecuted by the other assignees. This view has been entertained in other decisions and seems the most practical basis upon which to work out the rights of the parties. The assignee of the lease on a part of the leased premises who has developed his part with reasonable diligence should not be prejudiced because of the default of the other holders in developing their parts, and this is true even though it appears that, considering the development of all the holders collectively, the entire leased area as a unit has not been developed with reasonable diligence.

... An assignee of the lease on a part of the leased premises should not be regarded as in default on this implied covenant, even though he has never drilled upon his part, if it appears that enough wells have already been drilled by the other holders to produce efficiently all of the oil or gas underlying the entire leased premises. A contrary view would enlarge unduly the rights originally acquired by the lessor when he executed the lease.³⁵

Because there may be continued liability on the part of the lessee, after assignment, for the breach of implied covenants, and because there is some question as to whether these implied covenants are divisible when segregated portions of the lease are assigned, oil and gas leases now usually contain provisions to the effect that liability for the breach of any obligation under the lease will rest exclusively upon the owner of the lease, or of a portion thereof, who commits such breach.

A very interesting case concerning implied covenants was recently decided by the Fifth Circuit Court of Appeals.³⁶ In that case the appellants held separate leases from appellees covering three separate tracts of land in the Long Lake Field in Anderson County,

³⁴55 F.(2d) 634 (C.C.A. 5th, 1932).

³⁵Walker, *supra* note 15, at 451-452.

³⁶Tide Water Associated Oil Co. v. Stott, 159 F.(2d) 174 (C.C.A. 5th, 1946).

Texas. Appellants also owned other leases in the field covering lands lying to the north, east and south of appellees' tracts. Appellants and other operators in the field commenced cycling operations therein. In order to conduct cycling operations profitably, it was necessary to pool tracts. Appellants sought to obtain pooling agreements from appellees and offered appellees the right to participate in cycling operations on the same basis upon which other royalty owners in the field were participating. Under this arrangement appellees would have received royalties based on one-half of the liquid hydrocarbons recovered from the gas and on one hundred per cent of the gas sold or used from the leases and would have received no royalty on the dry gas returned to the reservoir. When appellees declined to unitize or participate in the cycling operations on the basis offered, appellants drilled a well on each of appellees' tracts and produced therefrom all of the oil and gas for which there was a market and paid appellees royalties thereon. Appellants pooled their other leases in the field and conducted cycling operations thereon, and the dry gas injected by appellants on the other leases spread under appellees' tracts and replaced a portion of the wet gas thereunder. The trial court allowed appellees to recover damages against appellants because of the encroachment of dry gas under appellees' tracts, saying there was an implied covenant under an oil and gas lease that the lessee would not injure his lessor's lease.

The Fifth Circuit Court of Appeals reversed the trial court. In a well-reasoned opinion by Judge Elmo P. Lee the court stated it was conceded that a reasonably prudent operator would not have drilled additional wells on appellees' tracts, appellants were producing all mineral products therefrom which could be produced without cycling and that cycling was not practical in the absence of unitization in which appellees had refused to participate. The court pointed out that there was no mention in the standard treatises of an implied covenant not to injure the lessor's lease and that the implied covenant of the lessee to do nothing to impair the value of the lease of the lessor is a duty to use reasonable care in good faith to protect the lease from drainage caused by drilling on lessee's adjoining land. The appellants had fulfilled this covenant and in offering the pooling plan to appellees, had fulfilled any duty of fair dealing imposed by the lessor-lessee relationship. The court concluded that appellees could not refuse to cooperate with appellants for their mutual protection in a practical, customary plan offered them and at the same time assert their demand for damages.

The writer would like to emphasize again the difficulties involved in expressly stipulating in an oil and gas lease the obligations of the lessee with respect to the development of the lease after discovery of oil or gas or with respect to the marketing of production. As an express covenant upon a matter excludes the implication by the courts of a covenant with respect thereto, the lessor in an oil and gas lease is usually more fully protected by the covenants the court will imply under the conditions as they actually exist than by express covenants for development and marketing based on an anticipation of conditions as they may exist.

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THE MISSISSIPPI BUSINESS SIGN STATUTE—
NECESSITY OF AGENCY OR PARTNERSHIP RELATION*

The Mississippi Business Sign Statute¹ first made its appearance in the Code of 1880, presumably being patterned after the Virginia Traders Act of 1839, as amended in 1849.² In the 67 years since the enactment of the Sign Statute the Mississippi Supreme Court and the federal courts have been called upon to decide at least 70 cases involving its interpretation. Its importance justifies copying it in full here.

If a person shall transact business as a *trader* or otherwise, with the addition of the words "agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his *principal or partner* by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action *used or acquired* in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property. (Italics added)

The words italicized in the quoted statute indicate that three fundamental factual requisites must be present before the statute applies. First, the debtor must be a "trader" within the meaning of the statute. Second, the trader must fail to disclose "his principal or partner" by his business sign. Third, the property in dispute must have been "used or acquired" in such business. Manifestly, if any one of these three requisites is lacking the statute has no application. Thus if one is acting for an undisclosed principal and the property is used in the business, the statute does not apply if the one transacting the business is not a "trader." Nor does the statute apply if the debtor is a trader acting for an undisclosed principal unless the property is used or acquired in the business. It should be equally clear that the statute has no application in a case where the debtor is a trader and the property was used or acquired in his business unless, in fact, he was acting for an undisclosed principal or silent partner.

The statute has received adequate interpretation as to two of these requirements: (1) when a person is a "trader" and (2) when property is "used or acquired" in the business. For this reason the decisions

*For other articles concerning the sign statute, see Schmitt, *The Sign Statute in Mississippi* (1928) 1 Miss. L.J. 203; Note (1930) 3 Miss. L.J. 155; Hemingway, *The Mississippi Business Sign Law* (1928) 6 TENN. L. REV. 95. For an excellent note on the Virginia Traders Act, see Note (1930) 16 VA. L. REV. 308.

¹MISS. CODE ANN. (1942) § 273.

²VA. CODE ANN. (Michie, 1924) § 5224, quoted *infra*, note 35.

interpreting these two requisites will be discussed only briefly. The decisions touching on the third requisite, i.e., failure to disclose a principal or partner, are conflicting and confusing. The purpose of this Note is to summarize and discuss these decisions. The effect of recordation by third parties of instruments which evidence their claim to disputed property also will be discussed.

A trader is one who makes it his business to buy merchandise, goods or chattels to sell the same for profit. A trader is not one who buys to keep or makes to sell, but one who buys to sell again.³ The word implies a mercantile transaction of barter and sale. The statute, therefore, does not apply to a restaurant⁴ or to a planing mill,⁵ but only to one conducting business as a trader or to one *ejusdem generis*. In this connection, it has been held that where a person conducts two distinct lines of business, although under the same name, only that property used in the line of business as a trader is affected.⁶

The property in dispute must have been used or acquired in the business. Thus mere permissive possession of the property, with no right to use it in the business, as where property is stored with another, does not bring the property within the operation of the statute.⁷ The property in question must have been acquired for use in the business with the knowledge and consent of the owner. Thus where property was sold under a conditional sale to one who falsely represented that it was for personal use but who actually used it in the business without consent or knowledge of the vendor, the property was held not to be affected by the statute.⁸ Also where property was conditionally sold to an individual who used such property in the business of a corporation which was subsequently formed, the statute was not applied.⁹

The remaining requisite is that the trader fail to disclose his principal or partner. Judge William Hemingway, speaking of the statute,

³*In re Hemming*, 51 F.(2d) 850 (S.D.Miss. 1931).

⁴*Carnaggio Bros. v. Greenwood*, 142 Miss. 885, 108 So. 141 (1926); *Oliver v. Ferguson & Allen*, 112 Miss. 521, 73 So. 569 (1916).

⁵*Yale v. Taylor*, 63 Miss. 598 (1886).

⁶*In re Hemming*, 51 F.(2d) 850 (S.D.Miss. 1931); *Orr v. Jackson Jitney Car Co.*, 115 Miss. 140, 75 So. 945 (1917).

⁷*Yellow Mfg. Acceptance Corp. v. American Oil Co.*, 191 Miss. 757, 2 So.(2d) 834 (1941); *Hall's Self Feeding Cotton Gin Co. v. Berg*, 65 Miss. 184, 3 So. 372 (1888).

⁸*Archibald v. General Motors Acceptance Corp.*, 172 Miss. 278, 159 So. 843 (1935).

⁹*Adams v. Berg*, 67 Miss. 234, 7 So. 225 (1890). In many other cases the Court has decided when a person is a trader and when property is used or acquired in the business. These cases differ only in the factual situations and no conflict in the application of principles of law exists. No effort has been made to list all those decisions here. They may be found in the annotation to § 273, MISS. CODE ANN. (1942).

said, "Its effect as to liability is to hold *undisclosed principals* and *silent partners*."¹⁰ (Italics added) The words of the statute itself hardly leave room for any other conclusion. The statute provides that if a person transacts business as a trader and fails to disclose the name of his *principal or partner* all the property used or acquired in the business is liable for his debts. This clearly indicates that, for the statute to apply, there must be a principal or partner to disclose. Even though the existence of an agency or partnership relation so clearly seems to be a fundamental prerequisite to the application of the statute the decisions of the Court as to this point are conflicting and confusing. The Court has not adequately considered this requirement in all cases.

In no case decided under the Sign Statute has the decision been based expressly on the existence or non-existence of an agency or partnership relation. In the following cases the debtor was a trader within the meaning of the statute and the property sought to be held was used or acquired in the business, but the Court quite properly did not apply the statute: *Dodds v. Pratt*,¹¹ *Campbell Paint & Varnish Co. v. Hall*,¹² and *Dorsey v. Latham*.¹³ In the *Dodds* case the debtor was a merchant, a trader, who gave a deed of trust to Pratt, the vendor, on his stock of merchandise to secure the purchase price thereof. *Dodds*, a judgment creditor of the merchant, took the goods on execution under the judgment. In holding that the statute did not apply and that Pratt was entitled to the goods, Judge Campbell, speaking for the Court, said:

. . . Section 1300 of the Code of 1880 does not derange the order of priority among the creditors of the person transacting business. The property made liable for his debts is to be subjected in the order of precedence fixed by law, independently of section 1300.¹⁴

At first glance this statement appears to be merely a limitation read into the statute by the Court, but further reflection will reveal that it is actually an outgrowth of the really fundamental consideration, that is, the existence or non-existence of an agency or partnership relation. To say that one is a creditor of a certain debtor is to say also that the latter is neither the agent nor the partner of the former. With relation to rights in a given chattel, one cannot be the principal of the person in possession of the chattel and at the same time be his creditor. The terms "principal-agent" and "creditor-debtor" connote different legal

¹⁰Hemingway, *The Mississippi Business Sign Law* (1928) 6 TENN. L. REV. 95, 105.

¹¹64 Miss. 123, 8 So. 167 (1886).

¹²131 Miss. 671, 95 So. 641 (1923).

¹³194 Miss. 253, 11 So.(2d) 897 (1943).

¹⁴64 Miss. 123, 126, 8 So. 167, 168 (1886).

relations which are incompatible when applied to the rights of the same individuals in a given chattel at a given time. Thus it appears that the Court necessarily found that Kiser was neither the agent nor the partner of Pratt, and that therefore the statute had no application. It is submitted that if the Court had based its decision expressly on this point a clearer precedent would have been established and the unsound result in some of the cases discussed hereafter would have been avoided.

In the case of *In re Caver*¹⁵ it was held that, in view of the fact that the deed of trust in the *Dodds* case was recorded, the decision could be taken as authority only for the proposition that the Sign Statute does not derange the order of priority of creditors of the same debtor *if the instrument evidencing the claim is recorded*. As pointed out later in the case of *In re Hemming*,¹⁶ the official report of the *Dodds* case does not state that the deed of trust was recorded (and the transcript of the record in the Supreme Court seems to be lost), but the original record in the office of the chancery clerk discloses this to be true. It seems reasonable to assume, however, that if the Mississippi Court had based its decision on recordation some mention of that fact would have been made. The *Caver* decision did not refer to the *Campbell Paint & Varnish Co.* case, decided by the Mississippi Court seven years before, in which it was held that a purchase-money lien, necessarily unrecorded, was not affected by the Sign Statute.

In the *Dodds* case the deed of trust was on a stock of merchandise—goods intended for resale. The Court did not discuss the validity of this deed of trust except thus: "The goods were Kiser's undoubtedly, but the deed of trust he gave to secure the purchase money for them was coetaneous with his acquisition of title, and therefore he held them subject to the deed of trust, which was paramount to any other claim."¹⁷ As will be discussed more fully herein, this is an exception to the general rule that a deed of trust on a stock of goods, where they remain in the hands of the mortgagor with power to sell, is invalid.

In the *Campbell Paint & Varnish Co.* case the paint company sold goods to one Cagle and later, the purchase price not being paid, instituted proceedings in the circuit court to enforce its statutory purchase-money lien.¹⁸ The goods were levied on by the sheriff and set aside from the other stock of Cagle. After this had been done Cagle filed a voluntary petition in bankruptcy. Hall, the trustee, claimed title to the

¹⁵42 F.(2d) 293 (S.D.Miss. 1930).

¹⁶51 F.(2d) 850 (S.D.Miss. 1931).

¹⁷64 Miss. 123, 126, 8 So. 167, 168 (1886).

¹⁸MISS. CODE ANN. (1942) § 337

goods free from the purchase-money lien. The Court, after holding that the vendor had a statutory purchase-money lien even though the goods were intended for resale, held that this was a contest between creditors of the same debtor and the Sign Statute did not apply. The Court was careful to point out that this was a case where the vendor had taken steps to enforce his lien and not one where at the time of the bankruptcy proceedings the seller had done nothing to enforce his lien. As to the latter situation, the Court expressed an opinion that the trustee in bankruptcy would prevail, and added, "But, as we understand, that is a federal question."¹⁹

The Court appears to have been over-cautious in expressing an opinion on this federal question. This question was decided by the Fifth Circuit Court of Appeals in *Commercial Credit Co. v. Davidson*.²⁰ Here the seller of a truck, having both a conditional sales contract which was not recorded and the statutory purchase-money lien, based his claim on the lien. The property was taken by the trustee in bankruptcy before the seller had made any attempt to enforce his lien. The Court held that the trustee merely stood in the shoes of the bankrupt, and could assert no better title to the truck than the bankrupt had. The purchase-money creditor, being first in time, was first in right. Thus it appears that the purchase-money lienor was merely a creditor of the bankrupt, not his principal or partner, so the statute had no application.

The latest case in which the Sign Statute was involved was *Dorsey v. Latham*,²¹ decided by the Mississippi Court in 1943. In this case Dorsey sold automobile trailers to the Mississippi Truck Equipment Company, which trailers constituted part of its stock in trade. The trailers were seized under an attachment for rent owed to Latham but before the date set for the sale the Equipment Company filed a petition in bankruptcy and the sale was restrained. The trailers were delivered to the trustee in bankruptcy. The Court held that both Dorsey and Latham were creditors of the bankrupt and, therefore, the statute did not apply because "... more than fifty years ago in the case of *Dodds v. Pratt*, . . . this court said that: '[This section] does not derange the order of priority [of liens] among the creditors of the person transacting business' . . ."²²

Although in the preceding cases it was not expressly stated, it is clear that the Court recognized the necessity for there being an agency

¹⁹131 Miss. 671, 688, 95 So. 641, 644 (1923).

²⁰112 F.(2d) 54 (C.C.A. 5th, 1940).

²¹194 Miss. 253, 11 So.(2d) 897 (1943).

²²*Id.* at 259, 11 So.(2d) at 898.

or partnership relation before the statute will apply. These cases were soundly decided. However, in the next four cases to be discussed contrary results were reached. The facts are similar and no apparent ground for distinction exists.

One of the early cases, *Paine v. Hall Safe and Lock Co.*,²³ was decided by the Mississippi Supreme Court in 1887. In that case two brothers were transacting a jewelry business under the sign, "Buder Bros." They purchased from Hall Safe and Lock Co. an iron safe, title being retained for security purposes in the Safe Company by a conditional sales contract. Before the purchase money was paid, one Grath, owner of the building in which Buder Bros. transacted their business, sued out an attachment for rent against the brothers and levied it on this safe, found on the premises. The safe was sold under this attachment and bought by Paine. Learning of this, the Safe Company brought an action of replevin to recover possession of the safe. The lower court gave judgment for the Safe Company but this judgment was reversed by the Supreme Court. It was held that the Sign Statute applied. Referring to the statute, Judge Campbell, speaking for the Court, said:

. . . It first enacts that *traders*, and *all of like kind*, who employ signs, must by the sign truly indicate the *ownership*, or else the property, etc., used or acquired in such business shall be liable to the creditors of him who transacts the business.²⁴ (Last italics added)

The "ownership" to be indicated by the sign in this case was with reference to a single chattel. For aught that appears from the report, this safe was the only chattel in the business which was not owned by Buder Brothers. Thus, in order for the Safe Company to be protected, the sign must include, in letters easy to be read, this warning to the innocent public: "But the old iron safe in the corner belongs to Hall Safe and Lock Co."

The fallacy of this decision is the failure to consider one of the fundamental conditions precedent to the statute's application, i.e., that there be a principal to disclose. To require Buder Bros. to disclose their principal or partner is to require something which was impossible, for the reason that none existed. Buder Bros. were not partners of the Safe Co., **nor were they agents.** They were not acting for and on behalf of the Safe Co. No fiduciary relationship existed between them. This fact was called to the Court's attention in the brief for the appellee, in which the attorney said:

²³64 Miss. 175, 1 So. 56 (1887).

²⁴*Id.* at 179, 1 So. at 57.

There was a sign conspicuously displayed, and the parties conducting the business agreed with the notice given. The property covered by the sign "Buder Bros." was their property and liable for their debts to the extent of their interest in it. They were not *factors, agents, or partners of the Hall Safe and Lock Company*. The statute has no application to this case.²⁵ (Italics added)

Judge Campbell did not even discuss this important contention made by the Safe Company. Only three months before, Judge Campbell, speaking for the Court in the *Dodds* case, had said that the sign statute does not derange the order of priority among the creditors of the person transacting the business. This contention also was made by counsel for appellee.²⁶ In the *Paine* case were not the landlord and the Safe Company both creditors of Buder Brothers? Was not this a contest between creditors of the same debtor? It is submitted that, on the facts stated, this case was decided incorrectly for the reason that Buder Brothers had no principal or partner to disclose: the sign statute had no application.

In *Fitz Gerald v. American Mfg. Co.*,²⁷ decided by the Mississippi Court in 1917, Goodman purchased from the American Mfg. Co. certain fixtures, including one ceiling fan, for use in his pool hall. Title to all fixtures was retained by the vendor by conditional sales contracts, and all contracts were recorded except the one retaining title to the fan. It was conceded that Goodman was a trader. The Court held that the statute did not apply to the fixtures on which conditional sales contracts had been recorded, because the recordation satisfied the policy requirements of the statute by giving constructive notice to creditors. After thus holding the Court said:

But as to the ceiling fan, it appears that this fan was not included in the contract of sale that was recorded, and appellant Fitz Gerald had no notice that the title to the ceiling fan was retained in the appellee, and he had a right under the statute, to assume that this fan was owned by the said Goodman which was acquired and used in the business of a trader as transacted by Goodman; and it was therefore liable to his creditors for his debts: . . .²⁸

Fitz Gerald was landlord of Goodman and had seized the property when Goodman fell behind in the rent. Clearly in this case Goodman was not the agent nor the partner of the American Mfg. Co. in conducting

²⁵*Id.* at 179.

²⁶*Ibid.*

²⁷114 Miss. 580, 75 So. 440 (1917).

²⁸*Id.* at 586, 75 So. at 440.

his business. He was a mere purchaser from them. Here again, were not Fitz Gerald and the American Mfg. Co. both creditors of Goodman? This is a contest between creditors of the same debtor. Recordation should have no effect here for the reason that no agency or partnership relation existed and, therefore, the statute had no application. The facts in this case are on all fours with those in the *Dorsey* case where the Court correctly decided that the statute did not apply. It is submitted that, on the facts reported, this case also was decided incorrectly.

In 1922, the case of *Young v. Terry*²⁹ reached the Mississippi Supreme Court. The declaration alleged that the plaintiff was the owner of certain showcases and other property, which she sold to one Young, retaining title therein until the purchase price was paid; that the purchase price had not been paid; that Young had become a member of the mercantile company of Forbes & Co.; that the property was used in this business; that Forbes & Co. had been adjudged bankrupt; that plaintiff was not listed as one of the creditors; that the property was sold to defendant Terry; and that he wrongfully retains the property. A demurrer to this declaration was sustained. The Supreme Court affirmed the judgment with this short statement:

This demurrer was properly sustained. . . . [Here the Court quoted the Sign Statute.]

Under this section, as construed by this court, as to creditors, this property should be treated as the property of this mercantile concern.³⁰

This is the only reference to the Sign Statute and its requirements. It is difficult to see that anyone connected with Forbes & Co. was the agent or partner of the plaintiff. Would not the plaintiff be a creditor also? It is submitted that the statute had no application in this case.

The latest decision in this particular line of cases is *Ellzey v. Frederic*,³¹ decided in 1941 by the Mississippi Court. Kersenac operated a filling station, and in connection therewith operated a bar and dance hall, selling cold drinks, beer, and cigarettes. He purchased from Ellzey two electric refrigerators by conditional sales contract, the refrigerators being used in his business. The contracts were not recorded. The refrigerators were sold under a judgment against Kersenac and bought by defendant Frederic. Ellzey brought replevin to recover possession of the refrigerators. The lower court gave judgment for defendant. The

²⁹129 Miss. 281, 92 So. 76 (1922).

³⁰*Id.* at 286, 92 So. at 76.

³¹191 Miss. 633, 3 So.(2d) 849 (1941).

Supreme Court affirmed this judgment in so far as defendant was permitted to retain possession of the refrigerators. The Court said, speaking of the Sign Statute, "This section subordinated in favor of creditors of a trader the rights of a conditional vendor under an unrecorded contract retaining title."³² The only case cited as authority for this statement was the *Paine* case, which has been discussed previously in this Note. The Court then continued:

. . . Under the evidence the integration of the several services and activities into the business known as "Kersenac's Place" subjects property used or acquired therein to liability to creditors under the Business Sign Statute. *Quin v. Myles*, . . . *FitzGerald v. American Mfg. Co.*, . . . The peremptory instruction given for the defendant was proper.³³

The *Quin* case is not in point. That was a clear case of undisclosed principal where the agent and the principal entered into a written agreement whereby the agent conducted a bar and saloon for and on behalf of the principal who remained undisclosed. The business was conducted in the agent's name alone. The *Fitz Gerald* case also has been discussed previously in this Note. Thus it appears that the Court based its decision in the *Ellzey* case on two cases which, it is submitted, are fundamentally unsound, and on one which is not in point. What has been said about the *Paine* case in this Note applies with equal force to the *Ellzey* case. To require Kersenac to disclose his principal or partner was to require him to do something which was impossible for the reason that none existed. It is submitted that, on the facts stated in the official report of the case, this decision is unsound for the reason that Kersenac was neither the partner nor the agent of Ellzey: the Sign Statute had no application.

The seven decisions just discussed were cases where the trader owned all the property used in his business except for a few chattels which were owned by some undisclosed person. However, in none of these cases was the trader either an agent or a partner of the undisclosed person. In cases of this type, as in all cases, the same three fundamental requisites should be present before the statute applies. In the first three cases discussed, the Court recognized this fact, and the statute was not applied. In the last four cases discussed, the Court did not fully consider these requirements, and the statute was applied.

One case outside this jurisdiction discusses with extreme clearness the necessity that there be a partner or principal to be disclosed before

³²*Id.* at 638, 3 So.(2d) at 849.

³³*Ibid.*

the statute will apply. This case is *Southern Dairies, Inc. v. Cooper*,³⁴ decided by the United States Circuit Court of Appeals, Fourth Circuit, in 1929. The case arose in Virginia and the Court analyzes the Virginia Traders Act,³⁵ which is substantially the same as the Mississippi Business Sign Statute. An ice cream company leased an electric refrigerator for a term of years to a trader, then assigned all its rights to Southern Dairies. The trader became bankrupt and the trustee seized all the property in his business, including this refrigerator. Southern Dairies filed its claim with the trustee which was denied on the ground that the Traders Act applied and the refrigerator was deemed to be the property of the bankrupt. This action was affirmed by the district court, but this decree was reversed by the Circuit Court of Appeals. This Court held that the Traders Act did not apply. Speaking of the Traders Act, the Court said:

. . . the act applies *where there is an undisclosed agency or partnership*. It has no application to a merchant who is doing business in his own behalf, except in so far as he may be selling goods as agent of another. . . .

Of course, if he is doing business for himself in his own name and, consequently, has no principal or partner, there is no occasion for disclosure by means of the sign provided for, and *nothing to be disclosed thereby*; and, manifestly, the statute has no application to such a case. The statute applies logically in the case of goods belonging to another which are held for sale by a merchant who otherwise is doing business for himself in his own name, as in *Edmunds v. Hobbie Piano Co.*,³⁶ supra; for as to such goods the merchant is the agent of the owner for the purpose of making sale, and the owner is an undisclosed principal within the meaning of the statute.³⁷ (*Italics added*)

Proceeding, the Court said:

Any other interpretation of the statute would lead to great inconvenience and the most absurd consequences. . . . If therefore, the statute applies in the case of a merchant doing business

³⁴35 F.(2d) 439 (C.C.A. 4th, 1929).

³⁵V.A. CODE ANN. (Michie, 1924) § 5224: "If any person transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or 'and Co.' and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by notice published for two weeks in a newspaper (if any) printed in the city, town or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

³⁶97 Va. 588, 34 S.E. 472 (1899).

³⁷35 F.(2d) 439, 441-442 (C.C.A. 4th, 1929).

in his own name, even though he represents no principal or partner, then all chattel mortgages, conditional sales, and bailment contracts given by such merchants on their fixtures are void as against their creditors, even though duly recorded.³⁸ *Moreover, there is no way for the mortgagee or owner of such fixtures to protect himself; for, as the merchant in such cases has no principal or partner, the mortgagee or owner of the fixtures being neither, he cannot give the notice provided by the statute by putting up a sign. . . .*³⁹ (Italics added)

The legislature, in passing the act, probably intended for it to apply only to cases where the business being transacted is owned entirely, or at least to a substantial degree by some undisclosed person. Such a case was *Quin v. Myles*.⁴⁰ In that case the agent and the principal entered into a written agreement whereby the agent was to manage a bar and saloon for and on behalf of the principal for a specified compensation. The principal financed the business and took all the profits, except the amount agreed upon for the agent's compensation, but the principal remained undisclosed. The business was transacted in the name of the agent. The statute clearly applied and it was so held by the Court. However, there have been but few cases of this nature. Most of the cases have been those where the trader was the owner of all the property used in his business except for one or only a few chattels owned by some undisclosed person. For convenience these cases will be referred to as cases involving "fractional agency."

As used herein, the term "fractional agency" refers to a case where a person transacts business in his own name and owns all the stock and fixtures except one or a few chattels which are owned by an undisclosed principal. The term is used to refer only to cases where an agency or partnership relation exists between the trader and the owner with respect to a single or a few chattels. For example, *A* owns a variety store in its entirety except for a popcorn machine, owned by *B*, which machine *A* operates as agent of *B*. This is "fractional agency." The term is not

³⁸The Virginia Court holds that recordation does not prevent the statute from being applied. *Partlow v. Licklitter*, 100 Va. 631, 42 S.E. 671 (1902).

³⁹35 F.(2d) 439, 442-443 (C.C.A. 4th, 1929). Concerning the Mississippi Business Sign Statute, Judge Hutcheson of the Fifth Circuit Court of Appeals said, "It should not be tortured into a strained construction to defeat honest transactions entered into in accordance with upright business practices." *Floyd v. C. Nelson Mfg. Co.*, 93 F.(2d) 857, 858 (C.C.A. 5th, 1938).

An interesting comment was made on the *Southern Dairies* case in Note (1930) 16 VA. L. REV. 308, 315, in which the author said, "The *Southern Dairies* decision, therefore, makes intelligible a body of law which was fast becoming unintelligible. And it re-interprets the Traders Act in line with the modern business situation. One may hope, therefore, that the Virginia courts will give it their approval."

⁴⁰59 Miss. 375 (1882); see also *Louisiana Oil Co. v. Robbins*, 169 Miss. 39, 152 So. 846 (1934); *Meridian Land & Industrial Co. v. J. B. Ormond & Co.*, 82 Miss. 758, 35 So. 179 (1903).

used to refer to a case where one sells fixtures, as for example an iron safe, to another, retaining title for security of the purchase price. Here no "fractional agency" is involved, because the purchaser is not an agent of the seller with respect to the safe. The seller's interest is merely a security interest.

*Gillaspy v. International Harvester Co. of America*⁴¹ was a case involving "fractional agency." Hardware Company used in its business a gas engine under a contract of agency whereby Hardware Company demonstrated the engine in hopes of making a sale for Harvester Company and creating a market demand for such engines. Harvester Company's interest was not disclosed by the business sign. Hardware Company was declared bankrupt and the trustee was allowed possession of the engine for the benefit of the creditors. The Court held that the Sign Statute applied and that the engine would be treated as the property of the bankrupt.

In no case of this type did the Court discuss the question of whether the statute applied to cases of "fractional agency," either not considering the question at all, or thinking that the answer was so obvious that no discussion was necessary. Nor does it appear in any case that the question was raised by counsel.

The legislature provided a means by which the owner of the disputed property could be protected—by disclosure of his name on the sign. No other means of protection were afforded. Is it reasonable to assume that the legislature intended to include also within the scope of the statute a group of persons who, as a practical matter, could not take advantage of this method of protection? If the statute is applied to cases of "fractional agency" the owner of the property is not provided with a practical means of protection. Suppose *X* owns a drug store in its entirety except for the soda fountain which he operates as an agent of *Y*. For *Y* to be protected the sign must read something like this: "*X* Drug Store . . . But the soda fountain belongs to *Y*." Instead of there being only one chattel used in the business which is not owned by *X* suppose there are two, or three, or more, each owned by a different person. Each chattel not owned by *X* would have to be listed on the sign and its true owner disclosed. Then the sign would have to be changed with each change of ownership of these chattels. Taken to its logical extreme, the application of the statute to cases of this kind leads to ridiculous results which surely could not have been intended. *Y* could not be protected by placing a separate sign on the soda fountain, for it

⁴¹109 Miss. 136, 67 So. 904 (1915).

has been held that such a procedure does not remove the property from the operation of the Sign Statute.⁴² If *Y*'s name appeared on the sign without clear indication that his interest in the business was limited to the soda fountain probably this would constitute sufficient holding out to make *Y* a partner by estoppel.⁴³ If so *Y* would be liable personally for all debts incurred in *X*'s business.

There is this to be said against the position that the statute should not apply to cases involving "fractional agency." The line of demarcation would be very hard to draw. On one extreme is the case where the entire business is owned by an undisclosed person. Here the statute would apply. On the other extreme is the case where only one chattel is owned by an undisclosed person. Here the statute would not apply. Somewhere between these two extremes is the dividing line. Where is it to be drawn?

The Mississippi Court is committed to a policy of applying the statute to cases of "fractional agency." The harshness of such a policy possibly was the motivating factor which prompted the Court to engraft an exception to the statute, i.e., that recordation will remove the property from the operation of the statute. The effect of recordation will be discussed in detail herein. However, the rule that recordation removes the property from the operation of the statute reaches an equitable result only when the property is the subject of a conditional sales contract, chattel mortgage, or deed of trust, or other recordable instrument. In other cases the property could not be removed from the operation of the statute for the reason that there is nothing to be recorded.

It has been seen that three factual requisites must be present before the statute will apply, namely, that (1) the debtor be a trader, (2) the property sought to be held was used or acquired in his business, and (3) the trader fail to disclose his principal or partner by his business sign. Frequently cases arise where all of these requisites are present but the instrument evidencing the undisclosed person's claim to the property is properly recorded. The effect of such recordation will be considered here.

Gumbel v. Koon,⁴⁴ decided by the Mississippi Court in 1881, appears to be the first case to interpret the Sign Statute. In this first case the Court said, "The object of the statute was to prevent the as-

⁴²*In re Huber Motor Co.*, 1 F.Supp. 574 (S.D. Miss. 1932).

⁴³See *Fletcher v. Pullen*, 70 Md. 205, 16 A. 887, 14 Am.St.Rep. 355 (1889); *Harris v. North*, 78 W. Va. 76, 88 S.E. 603, 1 A.L.R. 356 (1916); 40 AM. JUR., *Partnership* § 78; 47 C.J., *Partnership* §§ 104, 105.

⁴⁴59 Miss. 264 (1881).

sertion of secret claims to property, as against creditors of the person who seems to be the owner of it, evidenced by his dealings with it; . . ."⁴⁵ In the same case the Court said:

. . . As to the creditors of Buffington, whether they were antecedent or subsequent creditors, *whether with or without notice* of the fact that he was but an agent of another, whether they did or did not extend credit to him in the business, or on the faith of his apparent ownership of the property, the property under this statute was his, and subject to their demands.⁴⁶ (Italics added)

Although the Court in the same opinion stated that the object of the statute was to prevent the assertion of secret claims, this language indicates that the Court would apply the statute even in a case where the claim of the owner of the property was not in fact secret. Nothing but strict compliance with the statute will suffice to protect the real owner. The interpretation of the Virginia Traders Act is in accord with this view.⁴⁷

This strict construction of the Mississippi statute was tempered eleven years later by the decision in *Tufts v. Stone*⁴⁸ in which the Court held that if the instrument which imposed the claim (in this case a conditional sales contract) was properly recorded, the statute had no application. No reason was given for this holding. The strict language of the statute does not permit such an exception. Obviously the *Tufts* case is inconsistent with the *Gumbel* case in this respect. A rule that actual notice of an agency is immaterial is incompatible logically with a rule that constructive notice by recordation achieves the object of the statute. As to personal property constructive notice by recordation is, in practical effect, no notice at all. However, the rule that recordation removes the property from the operation of the Sign Statute has been followed consistently since the *Tufts* case.⁴⁹ The Virginia court holds that recordation has no effect on the operation of the Traders Act.⁵⁰

In a recent case, *International Harvester Co. v. Gully*,⁵¹ decided in 1940, the Court said, "The purpose of the statute was to make the apparent owner the true owner, as to his creditors dealing with him

⁴⁵*Id.* at 267.

⁴⁶*Id.* at 266.

⁴⁷*Hoge v. Turner*, 96 Va. 624, 32 S.E. 291 (1899).

⁴⁸70 Miss. 54, 11 So. 792 (1892).

⁴⁹*Floyd v. C. Nelson Mfg. Co.*, 93 F.(2d) 857 (C.C.A. 5th, 1938); *Liquid Carbonic Corp. v. Phillips*, 68 F.(2d) 515 (C.C.A. 5th, 1934); *In re Loeb's, Inc.*, 279 F. 269 (N.D.Miss. 1922); *Fitz Gerald v. American Mfg. Co.*, 114 Miss. 580, 75 So. 440 (1917).

⁵⁰*Partlow v. Lickliter*, 100 Va. 631, 42 S.E. 671 (1902).

⁵¹188 Miss. 115, 194 So. 472 (1940).

without notice to the contrary.”⁵² The obvious implication from this language is that, if the creditor did have notice, the statute would not apply. In neither the *Gumbel* case nor the *Gully* case did it appear that the creditors actually had notice, so the quoted language must be considered as dicta. Thus it may be said that the dictum in the *Gumbel* case was disapproved by the dictum in the *Gully* case. The Supreme Court has not directly decided the question of whether the statute applies to a case where there has been no recordation but the creditor has full knowledge of the fact that the debtor is but an agent or partner of the owner of the property. The prediction may be ventured however that the Court would hold that the statute does not apply to such a case. This prediction seems justified in view of the dictum in the *Gully* case and the rule that constructive notice by recordation achieves the object of the statute. Before recordation will serve as constructive notice the instrument must have been acknowledged and the description of the property must be sufficient to identify it to the exclusion of all other property.⁵³

This immunity by recordation does not extend generally to cases where the property is intended to be resold. As a general rule a chattel mortgage or deed of trust on a stock of goods in trade where the mortgagor is allowed to retain possession with power to sell is fraudulent per se and void as to creditors of the mortgagor and bona fide purchasers without notice.⁵⁴ An exception to this general rule is recognized as to creditors in cases where goods are purchased for resale and a mortgage back is given to secure the purchase price, the mortgage covering only the goods purchased.⁵⁵ The Alabama Court recognized this exception but carefully limited it to cases where the mortgage was given by a purchaser to secure the purchase price of a stock of goods and covers only goods purchased and given as part of the transaction of the purchase.⁵⁶ The Alabama Court said that since the transaction did not withdraw from the creditors any property which was subject to their claims they were not hindered or defrauded. The Mississippi Court has held that where a conditional sales contract retains title in the seller to goods which are intended for resale, the seller is estopped to claim ownership against bona fide purchasers without notice.⁵⁷ By statute a chattel mortgage

⁵²*Id.* at 126, 194 So. at 473.

⁵³*Floyd v. C. Nelson Mfg. Co.*, 93 F.(2d) 857 (C.C.A. 5th, 1938); *Liquid Carbonic Corp. v. Phillips*, 68 F.(2d) 515 (C.C.A. 5th, 1934); *In re Caver, Caver & Co.*, 42 F.(2d) 293 (S.D.Miss. 1930).

⁵⁴*Simmons v. State*, 160 Miss. 582, 135 So. 196 (1931).

⁵⁵*Dodds v. Pratt*, 64 Miss. 123, 8 So. 167 (1886), cited *supra* note 14.

⁵⁶*Adkins v. Bynum*, 109 Ala. 281, 19 So. 400 (1896).

⁵⁷*Citizens' Sav. & Inv. Co. v. Hunt's Garage*, 128 Miss. 535, 91 So. 133 (1922).

is invalid as to creditors or bona fide purchasers if not recorded.⁵⁸ There is no such provision in the statutes as to conditional sales contracts. The Court has held that if the contract is not recorded, the seller's rights will be cut off by the Sign Statute. The Court has not been called upon to decide the question of whether the Sign Statute applies where title to goods intended for resale is retained by a conditional sales contract which is recorded. This is analogous in principle to a chattel mortgage on a stock of goods, given coetaneous with the purchase, to secure the purchase price. If this be a true analogy, the conditional sales contract would be valid, and if it were recorded, the goods would be removed from the operation of the Sign Statute.

The Court has held that the statutory purchase-money lien⁵⁹ is not extinguished by the Sign Statute,⁶⁰ and that the holder of a purchase-money lien and a title-retention contract may elect between a suit to enforce the lien and an action to replevy the property.⁶¹ Therefore, if the holder of a chattel mortgage or title-retention contract, although void, also has a purchase-money lien on the property in dispute, the statute will have no application and the holder of the superior lien will get the property. Of course, before this is true, all of the essentials necessary to confer a purchase-money lien must be present.⁶² Thus if a retail merchant gives a chattel mortgage on his stock of merchandise to secure a loan, his creditors could levy on the merchandise and hold it against the mortgagee. The mortgage is fraudulent per se and void as to his creditors, so the mortgagee has no claim to the merchandise by virtue of the mortgage. He does not have a purchase-money lien on the goods, because he did not sell them to the merchant. Actually, the Sign Statute is not involved in such a case, for the mortgagee is not the owner of the seized property and has no specific claim to it.

The Virginia rule is that recordation will not remove the property from the operation of the Traders Act. The Virginia court in *Hoge v. Turner*⁶³ held that the Traders Act applied even where the creditor had actual notice of the agency, saying, "The language of the statute is plain, explicit, and imperative. It leaves no room for exception or qualifica-

⁵⁸MISS. CODE ANN. (1942) § 868.

⁵⁹*Id.* § 337.

⁶⁰*Campbell Paint & Varnish Co. v. Hall*, 131 Miss. 671, 95 So. 641 (1923), cited *supra* note 12.

⁶¹*Superior Laundry & Cleaners v. American Laundry Mach. Co.*, 170 Miss. 450, 155 So. 186 (1934).

⁶²The essentials appear to be that (1) there was a sale of the property; (2) the purchase money was not paid; (3) the goods be in the possession of the first purchaser; or (4) in the possession of one deriving title or possession through him, with notice of such non-payment. MISS. CODE ANN. (1942) § 337.

⁶³96 Va. 624, 32 S.E. 291 (1899).

tion. . . . Knowledge or want of knowledge plays no part in the application of the statute. That is an immaterial matter."⁶⁴ The Virginia court in *Partlow v. Lickliter*⁶⁵ held that recording had no effect on the operation of the statute. After quoting the language above from the *Hoge* case, the court said:

The conclusion from that statement of the law is irresistible that knowledge or notice of ownership, actual or constructive, will not exempt the property from liability for debts of the party in possession and conducting the business. To hold otherwise would be to engraft upon the statute an exception not warranted by the language, and tends to defeat its manifest object.⁶⁶

As has been previously stated, it is inconsistent, from a standpoint of strict logic, to hold that the requirements of the statute are not met when the creditor has actual knowledge that the debtor is but an agent of another, and then to hold that such requirements are met by mere constructive notice. But strict rules of logic often must be tempered with a sense of justice. This consideration probably is the best explanation of Mississippi's rule as to recordation.

Both the Mississippi and Virginia Courts are committed to the policy of applying the statute to cases involving "fractional agency." In such a case it is well nigh impossible for the true owner of the property in question to protect himself. To permit a creditor to seize property and hold it against the true owner would be extremely unjust when the latter has not been given practical means to protect himself. In Mississippi such a harsh result is avoided, in some measure, by allowing the true owner to remove his property from the operation of the statute by recording the instrument which evidences his claim. This may not be the more logical rule, but it is undoubtedly the more equitable one, in view of the fact that the Court applies the statute to cases of "fractional agency."

Conclusion

The wording of the Sign Statute clearly indicates three factual requisites which must be present before the statute applies. These are that (1) the debtor be a "trader" within the meaning of the act, (2) the property sought to be held be "used or acquired" in the business, and (3) the debtor fail to disclose the name of his "principal or partner." The Court has adequately interpreted the first two requisites. The Court has failed, however, to consider properly the third requirement.

⁶⁴*Id.*, 32 S.E. at 294.

⁶⁵100 Va. 631, 42 S.E. 671 (1902).

⁶⁶*Id.*, 42 S.E. at 672.

No case has turned expressly on the existence or non-existence of an agency or partnership relation. In three cases, however, the Court of necessity recognized the indispensability of such relation by holding that the statute does not apply in a contest between creditors of the same debtor. Conflicting with these cases are four decisions in which the Court failed to recognize this requirement and applied the statute when the trader was neither the agent nor the partner of the person whose property was seized. Manifestly, the statute should not have been applied in these cases.

The statute has been applied to cases of "fractional agency," i.e., cases where the trader owns the entire business except for one or a few chattels owned by a principal and used in conducting business for and on his behalf. As the statute is written, injustice results from its application to those cases of "fractional agency" where there can be no recordation, for the reason that the owner of the property cannot protect himself. The same policy reasons which demand the statute's application in cases where the entire business is owned by an undisclosed principal may well demand its application to cases of "fractional agency." This should not be true, however, unless the owner of the property is given some reasonable means of protection. This protection could be given very practically by permitting disclosure of the name of the principal or partner by the use of separate signs placed on each chattel or part of the business not owned by the trader. This method of disclosure is not available under the present statute.

The following suggested statute, in lieu of the present Sign Statute, is submitted as a possible solution:

If a person shall transact business as a trader, or otherwise, *in the capacity of agent or partner of another*, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, all the property, stock, money, and choses in action, *in which such principal or partner has an interest*, used or acquired in such business shall, as to the creditors of any such person, be liable for his debts. *If only a part of the business is conducted by such person in the capacity of agent or partner of another, the disclosure of the identity of such principal or partner may be made, if desired, by a separate sign or signs, in letters easy to be read, placed conspicuously on or near each chattel or part of the business in which such principal or partner has an interest, and clearly designating the chattel or part of the business intended.*⁶⁷ (Italics indicate added provisions)

⁶⁷Some of the provisions of the Sign Statute have been omitted. These provisions seem to be mere surplus verbiage, the deletion of which does not alter the

The first provision added to the statute would make it clear that the statute has no application unless the trader is acting as agent or partner of the person whose property is sought to be held by creditors of the trader. The phrase, "in which such principal or partner has an interest," is inserted to take care of a case where the trader is operating different parts of the business for several different principals, some of whom are disclosed and some of whom are undisclosed. In such a case only that property in which the undisclosed principal or partner has an interest will be liable for the debts of the trader. Without such provision, if the trader fails to disclose one of his principals *all* the property, etc., used in the business will be liable for his debts. If the statute is strictly construed this would include also the property belonging to the disclosed principals. Of course, the property belonging to the trader himself is liable for his debts even in the absence of statute.

The last sentence of the proposed statute is added to afford the principal a practical means of protection in cases of "fractional agency." It provides an alternative—the identity of the principal may be disclosed by the business sign outside the building or by separate signs inside the building. If only one principal, who owns a substantial part of the business, is involved, he may either disclose his name on the sign outside or he may choose to set his portion of the business aside and place a conspicuous sign inside the building. This is done quite frequently in cases where all the stock and fixtures in a meat market are separated from the other property in a grocery store. No fraud could be worked on the creditors of the trader. Whether the name of the principal was disclosed, whether the letters on the sign were easy to be read, whether the sign was placed conspicuously on or near the chattel or part of the business intended, and whether the chattel or part of the business intended were clearly designated would be questions of fact in each case. The same

meaning of the statute. The words, "with the addition of the words 'agent,' 'factor,' 'and company,' or '& Co.,' or like words," contemplate cases of partially disclosed principals or partners. The clause, "or if any person shall transact business in his own name without any such addition," contemplates cases of undisclosed principals or partners. This clause did not appear in the Traders Act as enacted in 1839. It was added by the amendment of 1849 so that the Act, when enacted into the Mississippi Code of 1880, was expressly applicable to cases of both partially disclosed and undisclosed principals or partners. Thus, other essentials being present, the statute will apply in all cases unless the *name* of the principal or partner is disclosed. In the proposed statute the provision, "If a person shall transact business as a trader, . . . and fail to disclose the name of his principal or partner," reaches the same result. The words, "and be in all respects treated in favor of his creditors as his property," add nothing to the provision that the property "shall, as to the creditors of any such person, be liable for his debts."

For an interesting history of the Virginia Traders Act, see *Southern Dairies, Inc. v. Cooper*, 35 F.(2d) 439 (C.C.A. 4th, 1929).

questions of fact arise as to the sufficiency of the disclosure by the sign under the present statute.

It is believed that if some changes, similar to those suggested herein, were made in the Sign Statute the inequities which have resulted in many cases would be avoided.

Rowland W. Heidelberg, Jr.

THE LIABILITY OF AN UNDISCLOSED PRINCIPAL AFTER SETTLEMENT
WITH THE AGENT

The problem which is discussed in this Note is illustrated by the following hypothetical situation: *A*, an agent, apparently for himself but actually on behalf of *P*, an undisclosed principal, purchases goods from *T*, a third party. *P* thereafter pays *A* for the goods or otherwise settles with him. *A* fails to settle with *T*. What are the liabilities of *P* to *T*?

Generally, an undisclosed principal, when subsequently discovered, may, at the election of the other party, if exercised within a reasonable time, be held liable upon all simple non-negotiable contracts made in his behalf by his duly authorized agent. This is true even though the contract was originally made with the agent in entire ignorance of the existence of a principal.¹

Numerous arguments have been advanced both for and against the rule. Some authorities feel that since the undisclosed principal receives the benefits of the contract, he should discharge the obligations thereof. On the other hand, the imposition of liability on the undisclosed principal has been criticized on the following grounds: (1) that contract principles are violated by permitting a person to be bound upon a contract to which he does not appear as a party; and (2) that the third party receives a "windfall"—the benefit of the principal's liability for which he did not contract. Courts occasionally have reflected their doubt as to the wisdom of applying the rule.² Nevertheless, it has received unanimous adoption.³

The rule imposing liability on the undisclosed principal is subject to certain qualifications and restrictions. These may be stated generally.

¹Hill v. Gratigny Plateau Development Corp., 57 F.(2d) 142 (C.C.A. 7th, 1931), cert. denied, 284 U.S. 690, 52 S.Ct. 266, 76 L.Ed. 583 (1932); Brooks v. Shaw, 197 Mass. 376, 84 N.E. 110 (1908); 2 AM. JUR. 308 §394, n.17; 3 C.J.S. 170 §244, n.62.

²"It may be said, perhaps truly, that this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule." Armstrong v. Stokes, 7 Q.B. 598,610 (1872).

³See note 1 *supra*.

It does not apply to (1) instruments under seal⁴ or (2) negotiable instruments⁵ on which the principal's name does not appear. Further, the principal cannot be held liable, where the third party, after discovery and with full knowledge as to who the principal is, and with power of choosing between him and the agent, distinctly and unquestionably elects to treat the agent alone as the party liable.⁶

Extensive difficulties have been experienced in applying the rule where there has been a *settlement or other change of position* between the principal and the agent, and the agent has failed to pay the third party. Under these conditions, when the rule is applied without reservation, it results in the principal paying twice on the contract. On the other hand, if the rule is not applied, and the third party cannot enforce his claim against the agent for some reason, such as the agent's insolvency, the third party is left without a remedy. This situation has resulted in the courts groping for a suitable exception to the rule in an attempt to avoid its harshness. The exception evolved has, at various times, been broadened or narrowed according to the philosophy of the court applying it and the exigencies of the situation presented. These variations result from attempts by the courts to balance the equities between the parties concerned. The historical development of these variations and the rules which now prevail are considered herein.

Development in England

As early as 1804 some English jurists indicated their belief that the general rule that an undisclosed principal is liable on contracts made by his agent should be moderated where it resulted in requiring double payment by the undisclosed principal.⁷ However, the general rule was adhered to in *Waring v. Favenck*⁸ and *Kymer v. Suwercropp*,⁹ decided in 1807. These cases would have afforded an excellent opportunity for the court to relax the general rule. Both cases arose out of the insolvency of a certain broker. This broker, prior to his insolvency, purchased coffee

⁴RESTATEMENT, AGENCY (1933) §191; 1 WILLISTON, CONTRACTS (2d ed. 1936) §296; 2 AM. JUR. 312 §396, n.2; 3 C.J.S. 173 §246, n.85.

⁵BRITTON, BILLS AND NOTES (1st ed. 1943) §163; RESTATEMENT, AGENCY (1933) §192; 2 AM. JUR. 312 §397, n.8; 3 C.J.S. 175 §247.

⁶MECHEM, OUTLINE OF AGENCY (3d ed. 1923) §467; 3 C.J.S. 176 §248, n.8; Note (1909) 21 L.R.A.(N.S.) 786.

⁷In note (a) to *Addison v. Gandasequi*, 4 Taunt. 574,576, 128 Eng.Rep.R. 454,456 (1812), Lord Mansfield, while summing up in the two unreported cases of *Railton v. Hodgson* and *Peele v. Hodgson* (1804), is quoted as making the following statement: "If Hodgson [the principal] had really paid Smith, Lindsay & Co. [the agents], it would have depended upon circumstances whether he would be liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so."

⁸1 Campb. 85, 170 Eng.Rep.R. 886 (1807).

⁹1 Campb. 109, 170 Eng.Rep.R. 894 (1807).

for an undisclosed principal. Upon discovery of the principal and suit against him by the third party, a defense of set-off of a debt due by the broker to the principal was claimed in the first case. In the second, the defense was payment by the principal to the broker. Recovery was allowed against the principal in both cases.¹⁰ The *Suwerccropp* case is also important because of the following dictum of Lord Ellenborough:

If he [the third party] lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods has been paid to the broker on account of this deception, the principal shall be discharged.¹¹

This language evidences, for the first time, a theory which was subsequently adopted as the prevailing English view.

The first case in which a relaxation of the rule was indicated positively was *Thomson v. Davenport*.¹² Settlement or change of position between the principal and the agent was not in issue. The statements which form the basis of the exception were entirely unnecessary to a proper determination of the case. Nevertheless, the court, by way of dictum, stated: the principal should not be held liable to the third party where there has been a payment by the principal to the agent, or where the state of accounts between the principal and agent has been so altered that it would be unjust to require payment again by the principal to the third party.¹³ In *Smyth v. Anderson*,¹⁴ decided in 1849, the court un-

¹⁰In *Kymer v. Suwerccropp*, 1 Campb. 109,112, 170 Eng.Rep.R. 894,895 (1807), Lord Ellenborough stated: "A person selling goods is not confined to the credit of a broker who buys them; but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be, were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant."

In the *Favenck* case and the *Suwerccropp* case the third party dealt with a *broker*. A broker commonly was accepted as always acting for a principal. Thereby, a third party dealing with him would be put on notice that a principal existed, and thus might reasonably assume that he could look to such principal for a settlement of the obligation. This consideration may have had some influence on the court.

¹¹*Kymer v. Suwerccropp*, 1 Campb. 109,112, 170 Eng.Rep.R. 894,895 (1807).

¹²9 B.&C. 78, 109 Eng.Rep.R. 30 (1829). Here the agent disclosed that he was purchasing for a principal in Scotland, but did not disclose his identity. Upon the agent's insolvency, the third party sued the principal. A defense that the third party had elected to look to the agent was interposed. The principal was held liable. The court held that the partial disclosure that a principal existed was an insufficient basis for an election by the third party.

¹³Lord Tenterden stated: "I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with the principal), but afterwards discover that the person with whom he has been dealing is not the principal in the transaction, but agent for a third party, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; *subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.*" *Id.* at 86, 109 Eng.Rep.R. at 33. (Italics added)

And Bayley, J., stated: "Where a purchase is made by an agent, the agent does

qualifiedly adopted and applied the dictum in the *Davenport* case.¹⁵

The next case, in point of time, was *Heald v. Kenworthy*.¹⁶ The court there pointed out that the language used in the *Davenport* case was mere dictum, and indicated that it stated too broad an exception.¹⁷ In an attempt to limit this broad language, the court set forth the following rule: the principal will not be held liable to the third party where the principal is induced by the words or conduct of the third party to pay the agent in the belief that the agent and third party have come to a settlement on the matter, or that the third party relies solely on the agent for payment.¹⁸ This case represents the present English rule.

not of necessity so contract as to make himself personally liable; but he may do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. *If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to an action brought by the seller where he had looked to the responsibility of the agent.*" *Id.* at 88, 109 Eng.Rep.R. at 34. (Italics added)

¹⁴⁷ C.B. 20, 137 Eng.Rep.R. 9 (1849).

¹⁵Maule, J., speaking of the *Hodgson* cases and the *Davenport* case, stated: "These two dicta—and I find nothing in any other case to detract from their authority—seem to me to afford a sensible rule on the subject." *Id.* at 36, 137 Eng.Rep.R. at 15.

And further: "It seems to me that the case falls within the rule laid down by Sir James Mansfield, C. J. and Bayley, J., by which a party is held to be discharged where it would be evidently unfair and unjust to charge him." *Id.* at 41, 137 Eng.Rep.R. at 17.

¹⁶10 Exch. 739, 156 Eng.Rep.R. 638 (1855). This was an action by the third party against the principal for goods sold and delivered. The principal answered, alleging settlement with the agent "according to the usual course of business," while the third party still extended credit to the agent. A demurrer to this plea was sustained.

¹⁷Parke, B., stated: "But there are no doubt cases and dicta, which, unless they be understood with some qualification, afford ground for the position taken by the counsel for the defendant. First, there is the dictum of Bayley, J., in *Thomson v. Davenport*, where that learned Judge lays down the rule, that . . . [Here Parke, B., quotes the language of Bayley, J., cited in note 13 *supra*.] The expression, 'make it unjust,' is very vague; . . ." *Id.* at 745-746, 156 Eng.Rep.R. at 641.

¹⁸This rule is found in the following language of Parke, B.: "If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as for example, *where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal.* It would be unjust for him to do so. But I think there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position." *Id.* at 746, 156 Eng.Rep.R. at 641. (Italics added)

Thus, it will be noted that Parke, B., while evidencing due deference for the dictum of Bayley, J., that the principal should not be required to pay the third party where circumstances would "make it unjust" so to do, effectively limits those circumstances to cases involving misleading conduct by the third party.

Seventeen years later the case of *Armstrong v. Stokes*¹⁹ was decided. The court, in that case, felt that the rule of the *Kenworthy* case (that misleading words or conduct by the third party which induces the principal to act to his detriment relieves the principal) was too restrictive, when applied to a case in which the principal paid the agent while the third party was still unaware of the existence of a principal.²⁰ It attempted to broaden this doctrine by enunciating the following rule: the principal should not be held liable to the third party where the principal has *bona fide* paid the agent, at a time when the third party still gave credit to the agent, and knew of no one else as principal. The effect of the holding in this case, however, was limited by the following language:

We confine our decision to the case before us, where the defendant after the contract was made, and in consequence of it, *bona fide*, and without moral blame, paid J.&O. Ryder [the agent] at a time when plaintiff still gave sole credit to J.&O. Ryder, and knew of no one else. We think that after that it was too late for plaintiff to come upon defendant.²¹

Thus, the court broadened the rule of the *Kenworthy* case insofar as it related to those situations in which the principal is completely undisclosed; but it left the rule unchanged in its application to situations where the principal is partially disclosed, that is, the existence of a principal is known but his identity is not.

The final English case of particular importance was *Irvine v. Watson*.²² When this case was decided by the Queen's Bench Division,²³ the distinction was made again between those cases involving a completely undisclosed principal and those cases involving a partially disclosed principal.²⁴ As to the undisclosed principal the court adopted the

¹⁹ Q.B. 598 (1872). Here, the agent, acting for an undisclosed principal, purchased goods of the third party. The third party extended the agent 30 days credit. The principal paid the agent on the next "payday" after receipt of the goods, as was the custom of trade. After the expiration of the 30 days credit, the agent failed to pay the third party. Upon discovery of the principal, the third party sued him. Recovery was not allowed.

²⁰"We think that, if the rigid rule thus laid down [the rule of the *Kenworthy* case] were to be applied to those who were only discovered to be principal after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship." *Id.* at 610.

²¹*Id.* at 610-611.

²² Q.B.D. 414 (1880). The case involved a sale by the third party to an agent who revealed the existence, but not the identity, of the principal. The principal paid the agent who, in turn, stopped payment to the third party. In an action by the third party against the principal, recovery was allowed.

²³ Q.B.D. 102 (1879).

²⁴Bowen, J., stated: "There are two classes of sales through an agent to an undisclosed principal which it is necessary to distinguish. 1. Where the seller supposes himself to be dealing with a principal, but discovers afterwards that he has been selling to an agent, and that there is an undisclosed principal behind, the law

holding in the *Stokes* case,²⁵ that the principal will not be held liable where he *bona fide* paid the agent while the third party still extended credit to the agent and did not know of the existence of the principal. As to the partially disclosed principal, the court stated that the liability of the principal depended upon the facts of each case tending to show the nature of the contract and the arrangement made between the third party and the agent.²⁶ Without specifically referring to the rule of the *Kenworthy* case as a basis for its decision, the court, in effect, applied it by allowing recovery against the partially disclosed principal.²⁷ On appeal, the decision of the Queen's Bench Division was affirmed, *but on grounds entirely different from those advanced by that court*. The Court of Appeals expressed complete disapproval of the dictum of the *Davenport* case.²⁸ It unqualifiedly adopted the opinion of the *Kenworthy* case.²⁹ Further, the

allows the seller to have recourse on such discovery to the undisclosed principal, provided always . . . that the principal has not meanwhile paid the agent, or that the state of accounts between the principal and agent does not render it unjust, i.e., inequitable that the seller should any longer look to the principal for payment. . . . 2. The present case is one that belongs to a distinct but analogous class. At the time of the dealing in the goods the seller was informed that the person who came to buy was buying for a principal, but was not told and did not ask who that principal was, nor anything further about him." *Id.* at 105-106.

²⁵" . . . and it must now be taken to be the law that a seller who has given credit to an agent believing him to be a principal cannot have recourse against the undisclosed principal, if the principal has *bona fide* paid the agent at a time when the seller still gave credit to the agent, and knew of no one else except him as principal." *Id.* at 105-106.

²⁶Bowen, J., stated: "The case is altered where the agent when buying states that he has a principal whose existence, though he does not name him, he is authorized in mentioning. I think that the liability of the principal, who under such circumstances pays his agent, to pay over again to the seller must depend in each case on what passes between the seller and the agent acting within the scope of his authority, and on the precise nature of the contract which the agent has lawfully made." *Id.* at 107.

²⁷Bowen, J., stated: "It does not appear to me, . . . that the defendants [principal] . . . had any reason at all to believe that the sellers [third party] of the goods, whoever they might be, had no longer any claim upon any one except the broker." *Id.* at 108. It is submitted that this language is, in effect, an application of the rule of the *Kenworthy* case. What the judge evidently means to say is that the third party, by his misleading conduct, had not given the principal "any reason at all to believe" that he looked only to the broker.

²⁸Bramwell, L. J., stated: "It is true that in *Thomson v. Davenport* both Lord Tenterden and Bayley, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of accounts between the principal and the agent has been altered to the prejudice of the principal. But it is impossible to construe the dicta of those learned judges in that case literally; it would operate most unjustly to the vendor if we did. I think the judges who uttered them did not intend a strictly literal interpretation to be put on their words. But whether they did or no, the opinion of Parke, B., in *Heald v. Kenworthy* seems to me preferable; . . ." 5 Q.B.D. at 417.

²⁹After quoting the language of Parke, B., in *Heald v. Kenworthy*, Bramwell, L.J., made the following statement: "That is in my judgment a much more accurate statement of the law." *Id.* at 417. And Baggallay, L.J., stated: "If the dicta in *Thomson v. Davenport* are to be taken as strictly correct, they certainly go a long

distinction between an undisclosed and a partially disclosed principal was discussed, and the court indicated its inability to understand why this distinction should affect the liability of the principal.³⁰ *Armstrong v. Stokes*,³¹ although not expressly overruled, was rendered questionable as an authority.³² *Heald v. Kenworthy*,³³ on the other hand, has been approved in subsequent English decisions.³⁴

The English decisions may be summarized as follows: (1) The rule of the *Davenport* case (which limits the principal's liability where there has been a payment by the principal to the agent, or an alteration in the state of accounts between them) has been discarded as being too broad in relieving the principal of liability. (2) The rule stated in the *Stokes* case (which limits the principal's liability where there has been a *bona fide* payment by him, while still undisclosed, to the third party, and while the third party still extends credit to the agent) is now relegated to a position of disrepute, though never overruled. (3) The harshness of the general rule as to the principal's liability has thus been moderated to a limited extent by the adoption of the rule of the *Kenworthy* case (that the principal will not be subjected to liability after he has been induced to change his position by the misleading words or conduct of the third party).³⁵

way to support the defendants' contention. But it is to be observed that they were mere dicta, and quite unnecessary to the decision. The largeness of those dicta have since been dissented from by Parke, B., in the case of *Heald v. Kenworthy*, and with his dissent I entirely agree." *Id.* at 418.

³⁰Bramwell, L.J., stated: "It is to my mind certainly difficult to understand that distinction [between an undisclosed principal and a partially disclosed principal], or to see how the mere fact of the vendor knowing or not knowing that the agent has a principal behind can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default." *Id.* at 417-418.

³¹Q.B. 598 (1872).

³²Bramwell, L.J., stated: "But then the defendants rely on the case of *Armstrong v. Stokes*. Now that is a very remarkable case; it seems to have turned in some measure upon the peculiar character filled by Messrs. Ryder as commission merchants." 5 Q.B.D. at 417. And Baggallay, L.J., further stated: "But I think that is not the true view of the decision in *Armstrong v. Stokes*. It must be accepted with reference to the particular circumstances of that case." *Id.* at 419. And Brett, L.J., concluded: "If the case of *Armstrong v. Stokes* arises again, we reserve to ourselves sitting here the right of reconsidering it." *Id.* at 421.

"[*Armstrong v. Stokes*] must be treated as still being law, because it has not been definitely overruled. It is, however, a very doubtful authority, and certainly will not be in the least extended." BOWSTEAD, *DIGEST OF THE LAW OF AGENCY* (3d ed. 1907) 303.

³³10 Exch. 739, 156 Eng.Rep.R. 638 (1855).

³⁴*Davison v. Donaldson*, 9 Q.B.D. 623 (1882); *MacFarlane v. Giannacopulo*, 3 H.&N. 860, 157 Eng.Rep.R. 716 (1858).

³⁵That this is true is indicated by the following general statement of the law now prevailing in England upon this point: "Where a principal is indebted to a third person on a contract made by his agent, he is not discharged from his liability to pay the debt by any payment to or settlement with the agent, unless such payment

American Authorities

The question of the principal's liability after payment to the agent has arisen only infrequently in this country. Practically no cases have arisen where the point has been squarely before the court, but a substantial number of courts have voiced opinions by way of dicta. Most of the earlier decisions announce the rule as laid down by Judge Story in his work on Agency³⁶ and by Parsons on Contracts.³⁷ These writers set forth the rule of *Thomson v. Davenport*.³⁸ This explains the consistent support given the rule of this case by the early American cases.

Considerable misunderstanding is apparent in some of the later American cases as to the conclusions reached in *Irvine v. Watson*.³⁹ Courts have cited the opinion in the Queen's Bench Division as supporting the rule of the *Davenport* case. They have either ignored the decision in the Court of Appeals, or have merely stated that it affirmed the decision in the Queen's Bench Division, without discussing the grounds advanced for that affirmance.⁴⁰ They fail to note that although the Queen's Bench decision was sustained, the reasoning and authorities in that decision were expressly disapproved and overruled; and they apparently do not grasp that the Court of Appeals explicitly followed the rule of the *Kenworthy* case, which now prevails in England.

In spite of the clear-cut effect the holding in *Irvine v. Watson*⁴¹ had on English jurisprudence, its import upon American courts seems to have been practically nil. Most jurisdictions of this country consistently have followed the rule of *Thomson v. Davenport*,⁴² holding that payment or change in the state of accounts between the principal and agent will

or settlement takes place before the existence of the principal is discovered, or unless the third person by his conduct leads the principal reasonably to believe that the debt has been paid by the agent or that the third person has elected to look to the agent alone for payment, and the principal in consequence alters his position as regards the agent to his prejudice." 1 HALSBURY, LAWS OF ENGLAND (2d ed. 1931) §467.

It should be noted that inclusion of the phrase, "unless such payment or settlement takes place before the existence of the principal is discovered," indicates that the rule of *Armstrong v. Stokes* is still considered a part of the law.

³⁶STORY, AGENCY (6th ed. 1863) §449.

³⁷1 PARSONS, CONTRACTS (6th ed. 1873) 66.

³⁸9 B.&C. 78, 109 Eng.Rep.R. 30 (1829).

³⁹5 Q.B.D. 414 (1880).

⁴⁰In *Laing v. Butler*, 37 Hun 144 (N.Y. 1885), the court cited with approval *Irvine v. Watson* in the Queen's Bench Division, and the distinction there made between an undisclosed and partially disclosed principal. As to *Irvine v. Watson* in the Court of Appeals (where both *Armstrong v. Stokes* and the above distinction were criticized), the court merely says: "This case [*Irvine v. Watson* in the Queen's Bench Division] was affirmed on appeal." *Id.* at 149.

⁴¹5 Q.B.D. 414 (1880).

⁴²9 B.&C. 78, 109 Eng.Rep.R. 30 (1829).

preclude recovery by the third party against the principal.⁴³ A minority

⁴³*Federal*: *Fradley v. Hyland*, 37 F. 49, 2 L.R.A. 749 (C.C.S.D.N.Y. 1888). Here the agent was instructed to purchase for cash only, and the principal kept sufficient funds to make cash payment in the possession of the agent at all times. The agent purchased on credit from a third party who did not know of the principal. In an action by the third party against the principal when discovered, recovery was not allowed. The court discussed and distinguished the English decisions up to and including *Irvine v. Watson*, and refused to apply the rule of the *Kenworthy* case. The court stated: "It is therefore difficult to understand how, as an original proposition, it could be reasonably maintained that there is any liability on the part of one who has employed another to manage his interests in a business, or series of transactions, in which, as an incident, purchases of goods are to be made, has given him instructions not to purchase on credit, and has supplied him with funds to purchase for cash, to a seller who has sold to the person employed upon credit, and dealt with him as the only principal."

"Of course he would be liable, and the instructions not to buy on credit would go for nothing, if he did not supply the agent with funds to pay for the necessary goods, because in that case the agent would have implied authority to buy them on credit." *Id.* at 750-751.

Query: What difference does it make, from the standpoint of the third party, whether the agent has or has not been furnished with the funds necessary to make a cash purchase? Is the right of recovery by the third party to be made dependent on the actual "cash" furnished the agent by his principal, and which the agent has available at the time of the transaction? Is the third party required to determine that the agent has implied authority to purchase on credit, by demanding to know whether or not the agent has the "cash"?

Alabama: *Clealand v. Walker*, 11 Ala. 1058, 1064, 46 Am.Dec. 238, 240 (1847); "So if a person sells goods, supposing he is dealing with the principal, but afterwards discovers that the person with whom he dealt is not the principal in the transaction, but merely an agent, he may recover the amount of the principal, though he had debited the agent: Provided, the state of account between the principal and agent, is not altered to the prejudice of the former." The court cites *Thomson v. Davenport*.

California: Section 2335 of the California Civil Code provides: "If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him." It is submitted that, under this section, as long as the principal is undisclosed, he may *bona fide* settle with his agent, and thereby relieve himself of liability. When he receives "notice of the creditor's election to hold him," he is then, of course, disclosed.

The court refused to apply the statute in a case where the principal had settled with the agent (by paying him a percentage stipulated in a contract between them), but where there was still sufficient money left in an expense fund to meet the third party's demand, which arose out of a contract made by the agent without disclosing the principal. The court held that the settlement between the principal and the agent was no defense under this section. *Sims v. Frew*, 142 P. 106 (Cal. 1914).

Delaware: *Bush v. Devine*, 5 Harr. 375, 376 (Del. 1854): "If a sale be made to an agent, without knowledge of the principal, and the principal be afterwards discovered, the seller may sue the principal, though he charge the goods to the agent; provided he do so at such time as will not disturb any settlement as between principal and agent."

Georgia: Section 3596 of the Georgia Code of 1910 provides: "If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may go directly upon the principal, under the contract, unless the principal shall have previously accounted and settled with the agent."

Ketchum v. Verdell, 42 Ga. 534, 538 (1871): "The general rule, as I understand it, is that when one professes to act as agent of another, even if he has no authority at all, and as such agent, obtains goods which, in fact, go to the use and benefit of the principal, the seller may, at any time before the principal has settled with the pretended agent, notify the principal of the truth of the case and demand payment."

of American jurisdictions have applied the English rule that restricts the principal's immunity from liability to those cases where he has been misled into acting to his detriment by the words or conduct of the third party.⁴⁴

(Italics added) *Accord*: *Beacham v. Coe-Mortimer Co.*, 30 Ga.App. 456, 118 S.E. 441 (1923); *Price-Evans Foundry Co. v. Southern Bell Tel. & Tel. Co.*, 19 Ga.App. 264, 91 S.E. 283 (1917).

Illinois: *Fowler v. Pearce*, 49 Ill. 59, 62 (1868): "If this was true [payment by the principal to the agent prior to suit by the third party against the principal], . . . then appellant [principal] would not be liable for its payment."

Indiana: *Thomas v. Atkinson*, 38 Ind. 248 (1871). The court cites *Thomson v. Davenport*, and quotes, with approval, the language of both Lord Tenterden and Bayley, J. Excerpts from Parsons on Contracts and Story on Agency are also quoted with approval.

Massachusetts: *Emerson v. Patch*, 123 Mass. 541 (1878). The question is implied, but not decided in this case.

North Carolina: *Southern Ry. Co. v. W. A. Simpkins Co.*, 100 N.E. 418 (N.C. 1919). Here the court relieved the principal of liability on the grounds that he was disclosed, but went aside to consider the possibilities of the case under the assumption that the principal was undisclosed. The court concluded that the result would have been the same, since payment by the principal to the agent was established by the evidence here, and this would have exonerated the principal.

New York: *Fish v. Wood*, 4 E. D. Smith 327, 330 (N.Y. 1855): ". . . and that where an agent buys in his own name, without disclosing his principal, but for his benefit, though within the authority of the agent, and the principal, without any notice of the purchase or the claim of the vendor, pays his agent for the goods, he cannot be made liable afterwards to the vendor." *Accord*: *Rowan v. Buttman*, 1 Daly 412 (N.Y. 1865), quoting with approval the language of Lord Tenterden in *Thomson v. Davenport*; *Yenni v. Ocean National Bank of the City of N. Y.*, 5 Daly 421 (N.Y. 1874), citing *Thomson v. Davenport*; *Knapp v. Simon*, 96 N.Y. 284 (1884); *Laing v. Butler*, 37 Hun 144 (N.Y. 1885); *Harder v. Continental Printing and Playing Card Co.*, 117 N.Y.S. 1001 (1909); *Montague Mailing Machinery Co. v. All-Package Grocery Co.*, 182 App.Div. 500, 169 N.Y.S. 920 (1918). *Contra*: *Bonnell v. Briggs*, 45 Barb.Ch. 470 (N.Y. 1866), *Fish v. Wood* criticized.

⁴⁴*Connecticut*: *Willard v. Buckingham*, 36 Conn. 395 (1870).

Louisiana: *Hyde v. Wolf*, 4 La. 234, 236 (1832): "The rule of law, in our understanding of it, being well settled that where the agent buys in his own name, but for the benefit of his principal, the principal, when discovered, is bound as well as the agent, unless the vendor, with a knowledge of the circumstances, elected to make the agent his debtor; or after the sale the principal was induced to settle with the agent in consequence of a receipt or other documents furnished by the seller."

Missouri: *Schepflin v. Dessar*, 20 Mo.App. 569 (1886). This case involved a disclosed principal, but the court made the following statement: "The other party may choose to give credit to the agent exclusively after discovering the principal; and in that case he can not afterwards hold the principal liable; and statements or conduct of the party which led the principal to believe that the agent only will be held liable, and on the face of which the principal acts, will have the same result." *Id.* at 575. (Italics added)

Maryland: *York County Bank of Penn. v. Stein*, 24 Md. 446, 465 (1866): ". . . essential that the plaintiff should in some way have either deceived the principal, or induced him to alter his position and account towards his agent, before he is deprived of his remedy against the principal; and that it is now settled that the simple fact that the principal has paid his agent the funds with which to pay the plaintiff, does not deprive the plaintiff of his right to look to the principal, if the agent fail to pay over according to his orders." The court cited *Heald v. Kenworthy*. *Accord*: *Brown v. Bankers and Brokers Telegraph Co.*, 30 Md. 39 (1869).

The rule is stated as follows in the *Restatement of Agency*:

An undisclosed principal is discharged from liability to the other party to the contract if he has paid or settled accounts with an agent reasonably relying upon conduct of the other party, not induced by the agent's misrepresentations, which indicates that the agent has paid or otherwise settled the account.⁴⁵

Here the principal is relieved from liability by the "conduct of the other party, . . . which indicates that the agent has paid or otherwise settled the account," i.e., misleads the principal. This apparently follows the theory of the *Kenworthy* case. However, no decision has been found where the section has been applied.

Mississippi Authority

*Simmons Hardware Co. v. Todd*⁴⁶ is the only case wherein the Supreme Court of Mississippi has considered the problem discussed in this Note, and in that decision its remarks were dictum. Plaintiff sold goods to an agent of defendant, an undisclosed principal. Upon discovery, *but before payment by defendant to his agent*, plaintiff sued defendant. The court below directed a verdict for defendant. On appeal, the judgment was reversed, the court applying the general rule imposing liability on an undisclosed principal upon discovery.⁴⁷ As these facts indicate, the question of settlement between the principal and agent was not raised; yet, the court stepped aside to make the following statement:

If the principal is misled by the creditor to believe that such creditor intends to look alone to the agent for his claim, and thereby induces him to settle with the agent, the right of the creditor to charge the principal is gone.⁴⁸

⁴⁵RESTATEMENT, AGENCY (1933) §208. Substantially the same rule is applied in the case of a partially disclosed principal. *Id.* §183.

⁴⁶79 Miss. 163, 29 So. 851 (1901).

⁴⁷"Where a vendor sells goods to an agent for another person, whose name is not disclosed at the time of the purchase, the vendor, although credit is extended to the agent, may, upon finding out the principal, elect to pursue him for the purchase price." *Id.* at 166, 29 So. at 851.

⁴⁸*Id.* at 167, 29 So. at 852. The court also quotes that part of the dictum of Lord Tenterden in the *Davenport* case (note 13 *supra*) which lays down the general rule imposing liability on an undisclosed principal when he is discovered. However, it fails to quote the concluding phrase of this dictum which reads as follows: ". . . subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." It is obvious that this language qualifies the general rule. The only plausible explanation for such a glaring omission is: (1) that, since payment by the principal is not involved here, the part quoted by the court is all that was necessary to substantiate it in holding the principal liable on discovery, and (2) that the above phrase is contra to the dictum of the court quoted in the body of this Note. It is submitted that this apparently intentional *exclusion* coupled with the unnecessary *inclusion* of the dictum embracing the prevailing English view, is a strong indication that the court favors such view.

This dictum indicates a predisposition on the part of the court to apply the prevailing English rule. It provides at least some basis for the conjecture that such rule would be followed today in a proper case.

Conclusion

The effect of the rule now predominant in the United States is to permit the right of the third person to be defeated by dealings between the principal and the agent to which the third person is not a party. This is true even though the third party is innocent of any misleading conduct. That such a rule is too broad in immunizing the principal from liability and that it frequently reaches highly inequitable results is incontestable.

The English rule is more logical and results in just determinations in most cases. There are many cogent arguments in its favor. The contract is made for the principal, and ultimately he is the party who will reap the benefits. It is not, therefore, unreasonable that he should be required to meet the obligations incurred. Further, he is in far better position to protect himself than the third party. He has the most adequate means available to secure a thorough knowledge of all the facts. His agent conducts the transaction. He is in a position to require absolute proof from the agent that the obligation has been properly discharged, or that the third party, with complete knowledge of the circumstances, has elected to look to the agent. If, with these safeguards at his command, he fails to utilize them, but instead, settles with his agent, there is no injustice in requiring him to pay again.

The English view, however, is subject to some criticism. The distinction to be drawn between an undisclosed principal and a partially disclosed principal is not totally without merit in cases of the type here under discussion. Since misleading conduct by the third party is the element which defeats his right of recovery under the English rule, it is inequitable to apply that rule against him *where he does not know that a principal is in existence whom he may mislead*, that is, where the principal is completely undisclosed. To apply the English rule against the third party where the principal is undisclosed is to render the third party responsible for the effect his words or conduct have on a person whose existence is a complete secret to him.

The following rules, it is submitted, would reach more desirable results than either the prevailing English or American rule:

(1) Where there is a partially disclosed principal (the third party is informed that *a* principal exists), the English rule should be applied and the principal should be relieved of liability where he has been in-

duced by the misleading words or conduct of the third party, to pay the agent or otherwise settle with him. In this situation, the principal should not be required to pay again.

(2) Where the principal is completely undisclosed (the third party has no knowledge of the existence of a principal), the principal should be held liable to the third party. Any words or conduct indulged in by the third party while in complete ignorance of the existence of a principal should have no bearing on the liability of the principal. Payment, either by the principal or his agent to the third party, would be the only manner in which the principal's obligation might be discharged.

Reginald A. Gray, Jr.

RES IPSA LOQUITUR IN MALPRACTICE ACTIONS

During the past one hundred years there has been developed in our procedural law of torts a doctrine known as *res ipsa loquitur*—the thing speaks for itself. Although its application has been criticized by eminent text-writers,¹ it is recognized in every state except one.² *Res ipsa loquitur* is primarily a rule of evidence and not of substantive law. Ordinarily the burden is on the plaintiff in negligence cases, but *res ipsa* is designed to aid him in discharging it in certain difficult situations; when it is invoked its effect is to place the burden of going forward to explain the injury on the defendant. Usually there are four elements spoken of as necessary before the doctrine can be applied: (1) the instrumentality causing the injury was in the exclusive control and possession of the defendant;³ (2) the injury was not of the type which usually occurs when ordinary care has been used; (3) there was no contributory negligence on the part of the plaintiff; and (4) knowledge of the injury was more readily accessible to the defendant—the last element being more a reason for the existence of the doctrine than one of the necessary components.

The application of the doctrine of *res ipsa loquitur* has been rather limited in malpractice actions against physicians, surgeons, and dentists.

¹Carpenter, *The Doctrine of Res Ipsa Loquitur in California* (1937) 10 So. CAL. L. REV. 166, 178 *et seq.*; Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter* (1937) 10 So. CAL. L. REV. 459, 465.

²The Michigan court refuses to recognize the doctrine in name. *Ballance v. Dunnington*, 241 Mich. 383, 217 N.W. 329, 57 A.L.R. 262 (1928); *Burghardt v. Detroit United R. Co.*, 206 Mich. 545, 173 N.W. 360, 5 A.L.R. 1333 (1919). Although, the jury has been allowed to draw inferences of negligence from circumstantial evidence in *Loveland v. Nelson*, 223 Mich. 623, 209 N.W. 835 (1926); and *LeFaive v. Asselin*, 262 Mich. 443, 247 N.W. 911 (1933).

³That this element is not to be construed too literally, see PROSSER, TORTS (1st ed. 1941) 298.

The main reason for this reluctance on the part of the courts to apply the doctrine is that the subject matter with which they are dealing is of a scientific nature, and therefore the cause of the injury would not ordinarily be known to a jurymen. It is an established rule that malpractice must be affirmatively established by expert testimony;⁴ the only exception to this being when the injury is of such a nature that negligence is apparent to a layman.⁵ There are some courts which refuse to apply *res ipsa* to malpractice actions.⁶ They base their reasoning on the theory that a physician "is not a warrantor of cures"⁷ or "it would place too great a burden on the medical profession"⁸ or that "negligence in surgical operations should be shown by expert testimony instead of mere presumptions."⁹

However, most courts do recognize that *res ipsa loquitur* has a place in malpractice cases. Yet it is very cautiously applied—one rule being that it has no application unless there are special circumstances,¹⁰ but this rule does not evolve a very workable criterion. The doctrine is generally applied where there is no necessity for another doctor to testify that there was lack of care—in other words, the injury to plaintiff speaks of negligence itself. There is no dissent from the decisions of the courts which hold that no negligence will be inferred from a mere poor result or unsuccessful treatment. In the classic case of *Ewing v. Goode*,¹¹ Judge Taft said:

⁴*Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642 (1919); *Slimak v. Foster*, 106 Conn. 366, 138 A. 153 (1927); *Howell v. Jackson*, 65 Ga.App. 422, 16 S.E.(2d) 45 (1941); *Ramburg v. Morgan*, 209 Iowa 474, 218 N.W. 492 (1929); *Blackburn v. Baker*, 227 App.Div. 588, 237 N.Y.S. 611 (1929); *Henley v. Mason*, 154 Va. 381, 153 S.E. 653 (1930); *Holton v. Burton*, 197 Wis. 405, 222 N.W. 235 (1928).

⁵*Ales v. Ryans*, 8 Cal.(2d) 82, 64 P.(2d) 409 (1936); *Funk v. Bonham*, 204 Ind. 170, 183 N.E. 312 (1932); *Johnson v. Arndt*, 186 Minn. 253, 243 N.W. 67 (1932); *Richeson v. Roebber*, 159 S.W.(2d) 658, 141 A.L.R. 1 (Mo. 1941); *Benson v. Dean*, 232 N.Y. 52, 133 N.E. 125 (1921); *Peterson v. Hunt*, 197 Wash. 255, 84 P.(2d) 999 (1938).

⁶*Stephens v. Williams*, 226 Ala. 534, 147 So. 608 (1933); *Stacy v. Williams*, 253 Ky. 353, 69 S.W.(2d) 697 (1934); *Gallagher v. Kermott*, 56 N.D. 176, 216 N.W. 569 (1927); *Inglis v. Morton*, 99 Wash. 570, 169 P. 962 (1918); however, it will be seen from the decisions that plaintiff was usually trying to predicate a recovery on a bad result alone, and the courts merely laid down broad language, for in *Sellers v. Nash*, 209 Ala. 103, 95 So. 167 (1923), and *McCormick v. Jones*, 152 Wash. 508, 278 P. 181, 65 A.L.R. 1019 (1929), it was held that *res ipsa loquitur* did apply in malpractice actions. In *Quillen v. Skaggs*, 233 Ky. 171, 25 S.W.(2d) 33 (1930) the doctrine was applied, but on the curious basis that the defendant acted both as physician and proprietor of the hospital, and holding that it would not have applied if brought against the defendant as physician alone.

⁷*Ewing v. Goode*, 78 F. 442, 443 (C.C.S.D. Ohio 1897).

⁸*Engelking v. Carlson*, 13 Cal.(2d) 216, 88 P.(2d) 695, 697 (1939). Although California recognizes the applicability of the doctrine, the language used by the court in this case is illustrative of the underlying views held by those courts refusing to allow its application.

⁹*Teft v. Wilcox*, 6 Kan. 33, 46 (1870).

¹⁰*Vonault v. O'Rourke*, 97 Mont. 92, 33 P.(2d) 535 (1935).

¹¹78 F. 442 (C.C.S.D. Ohio 1897).

A physician is not a warrantor of cures. If the maxim, "Res ipsa loquitur," were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing act, for they would have to assume financial liability for nearly all the "ills that flesh is heir to."¹²

The fact that death results from an operation creates no inference of negligence,¹³ and this is true although the operation is a minor one, and death would be a very rare result.¹⁴ In the recent Mississippi case of *Sanders v. Smith*,¹⁵ an apparently successful tonsillectomy had been performed on the plaintiff's young daughter. A few hours later the child suddenly died. In an action against the physician, the plaintiff showed only these facts. In refusing to apply *res ipsa loquitur*, the Court, speaking through Judge L. A. Smith, Sr., said:

... the test, generally, is not that the result of the operation was unusual or unexpected, or even fatal, alone and by itself, because without an abnormal and rare end to an operation, there would not exist an occasion for an action in damages from it. The real question, generally, is whether or not in the process of the operation any extraordinary incident or unusual event, outside of the routine of the action of its performance, occurred, and beyond the regular scope of its customary professional activity in such operations, which if unexplained, would themselves reasonably speak to the average man as the negligent cause or causes of the untoward consequences. If there were such *extraneous interventions* then the doctrine of *res ipsa loquitur* would be applicable to call upon the defendant to explain the matter, by evidence of exculpation, if he could. The jury would then decide the question of fact in the case.¹⁶ (*Italics added*)

¹²*Id.* at 443.

¹³*Loudon v. Scott*, 58 Mont. 645, 194 P. 488, 492, 12 A.L.R. 1487, 1492 (1920), wherein it was said: "The gravamen of this case is negligence, and negligence cannot be inferred from the fact alone that the patient died. The maxim 'res ipsa loquitur' has no application to a case of this character. Negligence is not to be presumed; it must be proved . . ." *Cf. Mitchell v. Atkins*, 36 Del. 451, 178 A. 593 (1935).

¹⁴*Wimpy v. Rogers*, 58 Ga.App. 67, 197 S.E. 656 (1938); *Mournet v. Summer*, 19 La.App. 346, 139 So. 728 (1932); *Nelson v. Dahl*, 174 Minn. 574, 219 N.W. 941 (1928); *Dolan v. O'Rourke*, 56 N.D. 416, 217 N.W. 666 (1928).

¹⁵27 So.(2d) 889 (Miss. 1946).

¹⁶*Id.* at 892. It is evident from the above case the plaintiff merely failed in presenting proper evidence. If she had gone so far as to show the cause of death, or some specific act or omission on the part of the defendant, even by his own testimony, then an entirely different case would have been presented. For cases in which Mississippi has applied the doctrine to malpractice actions see *Prewett v. Philpot*, 142 Miss. 704, 107 So. 880 (1926); and *Waddle v. Sutherland*, 156 Miss. 546, 126 So. 203 (1929).

Although in this case there was no showing of the cause of death, in the majority of the courts the rule is not relaxed where there are "extraneous interventions," for it has been held in cases where the operation was performed while the patient was intoxicated and later died from the effects thereof, that the doctrine was inapplicable, although there was evidence that his heart was weakened.¹⁷ As to when there are two possible causes of death, the majority rule is that the doctrine will not be applied,¹⁸ although it has also been held that if the act complained of was a probable cause, then the presumption of lack of due care will arise.¹⁹

Res ipsa loquitur finds its most frequent use in cases where there is some specific act or omission alleged—the typical instance being where some foreign object is left in the body of the patient after an operation, and in this type suit there is a tendency away from the idea that negligence of the physician will not be presumed.²⁰ Indeed, the Mississippi Court, in the case of *Saucier v. Ross*,²¹ went so far as to make out a case of negligence per se when a physician left a rubber tube in the body of a patient for several years after an operation. There the Court used the following language:

Unexplained, the leaving of a four inch rubber tube in a patient's body by a physician is negligence, and it occurs to us that it would be very difficult for a physician to explain how he could leave a rubber tube in the patient's body, until the wound healed over same, and not be guilty of negligence in the treatment of his patient.²²

¹⁷*Loudon v. Scott*, 58 Mont. 645, 194 P. 488, 12 A.L.R. 1487 (1920); *Barker v. Heaney*, 82 S.W.(2d) 417 (Tex.Civ.App. 1935). Cf. *Levy v. Vaughan*, 42 App.D.C. 146 (1914), holding that not to make an examination of a patient about to undergo an operation would be an act of gross negligence, and that it would be criminal negligence for a doctor to administer ether without an examination of the patient.

¹⁸*McKinnon v. Polk*, 219 Ala. 107, 121 So. 539 (1929) (showing that it *could* have happened a certain way insufficient—proof must warrant a reasonable inference that it *did* happen that way); *Barker v. Heaney*, 82 S.W.(2d) 417, 420 (Tex.Civ.App. 1935), "The jury will not be permitted to guess which of two causes shown by the evidence may have caused the death of the deceased. Jury verdicts must be based on something more than speculation, conjecture, or inference. The plaintiff's evidence must exclude all other reasonable hypotheses of another and different sole proximate cause." *Yaggle v. Allen*, 24 App.Div. 594, 48 N.Y.S. 827 (1898).

¹⁹*Boucher v. LaRochelle*, 74 N.H. 433, 68 A. 870, 15 L.R.A.(N.S.) 416 (1908).

²⁰*Key v. Caldwell*, 39 Cal.App.(2d) 698, 104 P.(2d) 87 (1940) holds that the presumption of negligence is not overcome by the testimony of defendant that he followed the usual and ordinary practice. *Contra*: *Roark v. Peters*, 162 La. 111, 110 So. 106 (1926).

²¹112 Miss. 306, 73 So. 49 (1916).

²²*Id.* at 314, 73 So. at 50. *Accord*: *Smith v. Zeagler*, 116 Fla. 628, 157 So. 328 (1934); *Mitchell v. Sanders*, 219 N.C. 178, 13 S.E.(2d) 242 (1941).

However, it is the majority rule that failure to remove a sponge,²³ glass,²⁴ spring,²⁵ gauze,²⁶ or almost any foreign object imaginable²⁷ from a patient after an operation amounts to a *prima facie* case of negligence. On the other hand it is the view in some jurisdictions that if there were assistants helping with the operation, then there could be no presumption of negligence on the part of any one of them.²⁸ These holdings are in a minority, though, and the great weight of authority rules that a doctor cannot relieve himself of liability by a policy of having the nurse count the sponges, etc.²⁹

There is considerable confusion among the courts of this country when an external injury occurs to a portion of the body not under treatment. The California Court has made a distinction between those cases in which the injury occurs to a healthy portion of the body within the field of operation, where the doctrine is inapplicable, and those in which the injury is to a remote area of plaintiff's body, in which case *res ipsa* may be invoked.³⁰ The basis for this distinction is that the former is relative to the operation, and therefore not within the common knowledge of a layman, but in the latter case, it would be of a matter cognizable to a layman that negligence was present when injury is inflicted upon some remote and unaffected areas.³¹ A factor undoubtedly influencing the courts in applying the doctrine in this type case is the unconsciousness of the patient, if such exists.³² This is a very reasonable view since the plaintiff will have no knowledge of what transpired, thus fulfilling one of the basic requirements of *res ipsa*. While on this sub-

²³*Ales v. Ryans*, 8 Cal.(2d) 82, 64 P.(2d) 409 (1936); *Funk v. Bonham*, 204 Ind. 170, 183 N.E. 312 (1922); *Brossard v. Koop*, 200 Minn. 410, 274 N.W. 241 (1937).

²⁴*Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932).

²⁵*Wharton v. Warner*, 75 Wash. 470, 135 P. 235 (1913).

²⁶*Niebel v. Winslow*, 88 N.J.L. 191, 95 A. 995 (1915).

²⁷*Reinhold v. Spencer*, 53 Idaho 688, 26 P.(2d) 796 (1933) (needle); *Evans v. Munro*, 83 A. 82 (R.I. 1912) (drain).

²⁸*Harris v. Fall*, 177 F. 79, 27 L.R.A.(N.S.) 1174 (C.C.A. 7th, 1910); *Guell v. Tenney*, 262 Mass. 54, 159 N.E. 451 (1928); *Jewison v. Hassard*, 26 Manitoba L.R. 571, 28 D.L.R. 584 (1916).

²⁹*Spears v. McKinnon*, 168 Ark. 357, 270 S.W. 524 (1925); *Armstrong v. Wallace*, 8 Cal.App.(2d) 429, 47 P.(2d) 740 (1935); *Saucier v. Ross*, 112 Miss. 306, 73 So. 49 (1916); *Davis v. Kerr*, 239 Pa. 351, 86 A. 1007, 46 L.R.A.(N.S.) 611 (1913).

³⁰*Engelking v. Carlson*, 13 Cal.(2d) 216, 88 P.(2d) 695 (1939).

³¹It is to be noted that this California rule is not a hard and fast one, for the doctrine has been held to apply to an injury within the field of operation where the patient was also conscious. *Vergeldt v. Hartzell*, 1 F.(2d) 633 (C.C.A. 8th, 1924).

³²*Brown v. Shortlidge*, 98 Cal.App. 352, 277 P. 134 (1929); *Whetstine v. Moravec*, 228 Iowa 352, 291 N.W. 425 (1940); *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932).

ject it would be well to consider the case of *Ybarra v. Spangard*,³³ where the plaintiff was suing for an injury to his arm and shoulder which developed soon after defendant had performed an appendectomy upon him. In overruling the contentions of the defendant and greatly expanding and liberalizing the use of *res ipsa* in malpractice cases, Chief Justice Gibson, speaking for the Supreme Court of California, said:

Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who subjects himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.³⁴

In taking such a liberal tone as this, it is possible that the Court overruled the former decision to the effect that, although the patient is unconscious, if the injury is in the area of operation, then expert testimony is necessary in order to establish liability.³⁵ The general rule then may be summed up as this—if the patient is unconscious, *res ipsa* will be applied if an external injury is inflicted upon any healthy portion of his body; if he is conscious, then the injury must be to a healthy portion removed from the area of operation for the presumption to act.

It is one of the fundamental principles of *res ipsa loquitur* that it may only be used when there is no direct evidence of negligence. There is, on the other hand, the rule, which is just as firmly embedded, that injury alone is insufficient to raise any inference of lack of due care—there must be evidence of the injury and also of the surrounding circumstances in order for a plaintiff to invoke its aid. Between these two principles the courts are in a conflict as to whether pleading specific acts of negligence destroys the right to rely on the doctrine. The Mis-

³³25 Cal.(2d) 486, 154 P.(2d) 687, 162 A.L.R. 1258 (1944).

³⁴154 P.(2d) at 689, 162 A.L.R. at 1262.

³⁵As stated, in *Engelking v. Carlson*, 13 Cal.(2d) 216, 88 P.(2d) 695 (1939), the California court laid down the rule that the injury must be in a remote area, but the court in the *Ybarra* case cited *Brown v. Shortlidge*, 98 Cal.App. 352, 277 P. 134 (1929), which allowed the use of the doctrine when the injury was within the field of operation, and made the broad statement at the end of the decision: "... where a plaintiff receives unusual injuries while unconscious, and in the course of medical treatment, all those defendants who had any control over the body or instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct." 154 P.(2d) at 690, 162 A.L.R. at 1264.

Mississippi Court draws the line when limited specific negligence is charged and allows *res ipsa* to operate when only general specific negligence is alleged.³⁶ However, in malpractice actions, it is very rare indeed when specific negligence can be charged, for as a rule, the patient is at a loss as to the cause of the injury.

Another element which affects the applicability of the doctrine according to some courts is the extent of control exercised by the defendant. A strict view is taken of this requirement in a few of our jurisdictions, applying it only when defendant has not been absent during the time injury was inflicted,³⁷ has no assistants,³⁸ or was in actual possession or control of the injured portion of the body.³⁹ It is submitted that these courts have lost sight of the underlying principles of the doctrine, for actual control is not what is necessary, but rather the *right* of control.⁴⁰ Control over the instrumentality causing the injury is sufficiently in the hands of the defendant if he, together with his assistants,⁴¹ performed the operation, and it should make no difference that plaintiff had left the immediate presence of defendant before such injury was discovered, and the like rule should apply where there are several performing the operation, for plaintiff should not be denied his remedy merely because he is unacquainted with the facts and cannot definitely point out which of several was negligent.

It is submitted that the courts have been too harsh in applying *res ipsa loquitur* in malpractice suits. In the leading case of *Ybarra v. Spangard*,⁴² it was said:

There is, however, some uncertainty as to the extent to which *res ipsa loquitur* may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, which has a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily

³⁶*Aponaug Mfg. Co. v. Carroll*, 183 Miss. 793, 184 So. 63 (1938).

³⁷*Henzi v. Benezra*, 161 Misc. 490, 292 N.Y.S. 392 (1936); *Meadows v. Patterson*, 21 Tenn.App. 283, 109 S.W.(2d) 417 (1937).

³⁸*Guell v. Tenney*, 262 Mass. 54, 159 N.E. 451 (1928).

³⁹*Bollenbach v. Bloomenthal*, 341 Ill. 539, 173 N.E. 670 (1930), noted in (1931) 26 ILL. L. REV. 350; *Hazard Hospital Co. v. Combs*, 263 Ky. 252, 92 S.W.(2d) 35 (1936), noted in (1937) 26 Ky. L.J. 68.

⁴⁰PROSSER, *TORTS* (1st ed. 1941) 298.

⁴¹38 AM. JUR. 996.

⁴²25 Cal.(2d) 486, 154 P.(2d) 687, 162 A.L.R. 1258 (1944).

precludes its application in many cases where it is most important that it should be applied.⁴³

In a survey of the malpractice suits in which the plaintiff has attempted to invoke *res ipsa*, it will readily be seen that courts are often placing too much reliance on form rather than substance. Certainly *res ipsa* should apply in malpractice suits as in any other based on negligence, and its application should not be limited by technicalities when it is evident that plaintiff has suffered some injury and is entitled to his recourse at law. It is conceded that the doctrine is correctly rejected when it is predicated merely on a poor result, for otherwise, the physician would be called upon to guarantee a cure, when consideration must be taken of the complexities and differences in the human body and also of those unforeseen situations which no medical practitioner could prevent, even in the exercise of great care. Nevertheless it is plain that some courts are seeking for means to prevent its application when it is held that *res ipsa* does not apply in cases where there *might* have been an independent involuntary movement on the part of the plaintiff,⁴⁴ when it is settled law that plaintiff's involuntary movement does not prevent the use of *res ipsa* if it would be otherwise applicable to the case.⁴⁵ It will be again seen that technicalities often prevent justice, for the concurring opinion in the *Sanders* case admitted that gross negligence must have been present, but the court was prevented from acting in that it could not take judicial notice of the fact that death from a tonsillectomy was a rare and unusual result.⁴⁶ In this day and time, when courts are more and more realizing the need for a more adequate dispensation of justice in contrast to antiquated formulae, surely the applicability of the doctrine of *res ipsa loquitur* should be extended in malpractice cases where the balance of probabilities justify its use.

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⁴³154 P.(2d) at 689, 162 A.L.R. at 1261. In a comment in (1937) 26 Ky. L.J. 68, 69, the strictness of some courts in applying the doctrine is criticized in the following words: "Such reasoning has in itself a prohibitive effect in that one doctor will not testify against a fellow practitioner in good standing. Therefore without the benefit of *res ipsa loquitur* an injured patient is largely without recourse as to damages against the doctor because the knowledge of the circumstances causing the injury is rarely obtainable by him."

⁴⁴Vale v. Noe, 172 Wis. 421, 179 N.W. 572 (1920).

⁴⁵9 WIGMORE, EVIDENCE (3rd ed. 1940) §2509.

⁴⁶Roberds, J., concurring in *Sanders v. Smith*, 27 So.(2d) 889, 893 (Miss. 1946). By this concurring opinion, *res ipsa* would apparently be applied in cases of poor result if there were proof in the record that such result was unusual. As has been stated earlier, this would not be in accord with the general rule.

JUDICIAL REVIEW OF DETERMINATIONS OF OIL AND GAS
CONSERVATION AGENCIES

Under a typical statute, the oil and gas conservation agency in a state is empowered to adopt and promulgate such rules and regulations as may be reasonable and proper and such as it may deem necessary for the conservation of crude oil and petroleum. Pursuant to this authority, the agency adopts general rules and regulations for the spacing of oil wells. These regulations may provide, for instance, that all oil wells must be located on a drilling unit consisting of at least forty (40) acres, and that the location of the well shall not be greater than 330 feet from the center of the drilling unit; but that special exceptions for the prevention of waste or to avoid confiscation may be granted after notice and hearing. Suppose that *A*, the owner of thirty (30) acres of land, applies to the agency for an exception, claiming the general regulation will result in confiscation of his property; that after notice and hearing as required by statute, the agency grants the exception; and that *B*, the adjoining lessee, appeals to a court pursuant to provisions of the oil and gas statutes permitting such appeals. The trial court is confronted with a number of problems as to the scope of review, as to the procedure to be followed, and as to what evidence may be introduced. To understand these problems an examination of the statutes providing for review of the determinations of these agencies in producing states is helpful.

The modern oil and gas conservation statutes of the various states make rather elaborate provisions for testing the validity of the statutes and any act of the conservation agency thereunder. While there are slight variations as to the terminology employed in the various acts, the texts of the statutes are practically uniform as to the provisions for judicial review. The typical statute provides that any interested person may bring a suit to test the validity of any order, rule, or regulation of the administrative agency; describes the court proceeding as a "trial"; and places the "burden of proof" on the person bringing the suit.¹

While the majority of the state statutes do not limit the scope of review by the court on appeal, California specifically undertakes to declare what is the proper function of the court testing the validity of the order, rule, or regulation.² South Dakota on the other hand

¹Ala. Acts 1939, No. 645, as quoted 5 SUMMERS, OIL AND GAS (1946 Supp.) § 921(9).

²Cal. Stats. 1939, c. 93, as quoted 5 SUMMERS, OIL AND GAS (1946 Supp.) § 923(3355).

expressly declares that the court shall not be bound by the actual or presumed findings of fact made by the agency in support of any order of which complaint is made.³ Most of the statutes do not contain express provision as to what type of action the court will take, but the implication is that the court merely may approve or disapprove the action of the agency. Only one state specifically states that the court may supersede the order of the administrative agency and issue its own order.⁴

Uncertainty results from the almost universal failure of the statutes expressly to define the scope of review. As these statutes use such language as "the order of the Commission shall be prima facie valid" and "the burden of proof is on the party complaining of the validity of the order,"⁵ apparently the legislatures contemplated that there should be a trial in court just as in other civil actions.⁶ However, in the absence of a clear statutory mandate, the scope of review of action of the agency is a question of policy which must be determined by the courts. Since the Supreme Court of the United States has adopted the idea of non-interference with the state courts in the review of administrative action, the problem is left almost wholly to the local courts.⁷

While much litigation has taken place on the question of judicial review, the courts have not helped to eliminate the uncertainty arising from the loosely drafted statutes. A study of the decisions of the various courts reveals numerous conflicts in the holdings. The most outstanding example of confusion, ambiguity, and vacillation is found in Texas decisions. To properly understand the holding of the Texas courts, it must be remembered that the Railroad Commission, the state oil and gas conservation agency in Texas, has numerous other duties. By separate statutes, the Commission is designated the state

³S. D. Laws 1943, c. 153, as quoted 5 SUMMERS, OIL AND GAS (1946 Supp.) § 939(9).

⁴Kans. Laws 1945, c. 233, as quoted 5 SUMMERS, OIL AND GAS (1946 Supp.) § 927(9).

⁵N. D. Laws 1941, c. 170, as quoted 5 SUMMERS, OIL AND GAS (1946 Supp.) § 934(8).

⁶See 5 SUMMERS, OIL AND GAS (1946 Supp.) for statutes of other oil and gas producing states.

⁷Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S. 73, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940); Railroad Commission v. Rowan & Nichols Oil Co., 311 U.S. 570, 61 S.Ct. 66, 85 L.Ed. 358 (1941); Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). See Walker, *Developments in the Law of Oil and Gas in Texas During the War Years* (1946) 25 TEX. L. REV. 1; Summers, *The Rowan & Nichols Cases* (1941) 13 MISS. L. J. 417; Armstrong, *Federal Courts and Administrative Action Under State Statutes: An Aspect of the Rowan & Nichols Cases* (1942) 14 MISS. L. J. 335.

administrative agency to regulate railroads,⁸ motor transportation,⁹ gas utilities,¹⁰ and oil and gas conservation.¹¹ Each statute provides for the review of rates, orders, or regulations issued by the Commission in that particular field. As these statutes are practically identical, the courts cite as controlling in the oil and gas cases decisions under the other statutes.¹² While a review in this note of cases other than those involving oil and gas is impractical, decisions under the other statutes are authoritative. One of the most recent Texas decisions, *Trapp v. Shell Oil Company*,¹³ pointed out that there is a definite conflict in the prior cases of the Texas Supreme Court. This fact is admitted in both the majority and dissenting opinions. The history of the *Trapp* case itself illustrates the uncertainty in the Texas law.¹⁴

In some of the Texas cases, the district court permitted evidence to be introduced and made elaborate findings of fact after weighing the evidence and passing on the credibility of the witnesses. The Supreme Court of Texas has upheld such action of the district court on the ground that the cause should be tried the same as any other civil action.¹⁵ The language of the Court in *Railroad Commission (Trem Carr) v. Shell Oil Company* is illustrative of this attitude:

... The doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding upon the court, is foreign to the law of this state. We have found no Texas decision involving review of the orders of an administrative body which so restricts the court in the taking of testimony. . . . The act in

⁸TEX. ANN. REV. CIV. STAT. (Vernon 1925) Arts. 6453, 6454.

⁹*Id.* Art. 911a, § 20, Art. 911d, § 14.

¹⁰*Id.* Art. 6059.

¹¹*Id.* Art. 6049c, § 8.

¹²See Comment, *Judicial Review of Orders of the Texas Railroad Commission* (1942) 20 TEX. L. REV. 457.

¹³198 S.W.(2d) 424 (Tex. 1946).

¹⁴The *Trapp* case was tried by district court in accordance with the rules laid down in *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S.W.(2d) 73 (1939). Reversed by Court of Civil Appeals in accordance with the rules announced in *Railroad Commission (Trem Carr) v. Shell Oil Co.*, 139 Tex. 66, 161 S.W.(2d) 1022 (1942). Supreme Court reversed case and held that rules of *Gulf-Atlantic* case are now the law in Texas.

¹⁵*Railroad Commission v. Houston T. C. R. Co.*, 90 Tex. 375, 38 S.W. 750 (1897) (Duty of court to try case by the ordinary rules of evidence); *Railroad Commission v. Houston Chamber of Commerce*, 124 Tex. 375, 78 S.W.(2d) 591 (1935) (Rules governing ordinary suit applicable); *Railroad Commission v. Magnolia Petroleum Co.*, 130 Tex. 484, 109 S.W.(2d) 967 (1937) (Review based on evidence at judicial hearing); *Lone Star Gas Co. v. State*, 137 Tex. 279, 153 S.W.(2d) 681 (1941) (Full civil suit; transcript of testimony before Commission not admissible in district court) *Accord*: *Marrs v. Railroad Commission*, 142 Tex. 293, 177 S.W.(2d) 941 (1944) See dissenting opinion in *Trapp v. Shell Oil Co.*, cited *supra* note 13, at 442.

question contemplated that the evidence should be taken anew in the district court.¹⁶

The Texas Supreme Court in other cases involving the same type of review has held that the district court should try only questions of law. The district court under this view is privileged only to inquire into the facts to see if the finding is supported by substantial evidence or if the action is arbitrary or capricious.¹⁷ The Court in these cases has used the following reasoning:

... To permit the court to substitute its fact findings on the controverted issues of fact in such instances would add nothing of value to the administration of the law or the rule under discussion, but, to the contrary would destroy all uniformity of Commission administration thereunder.¹⁸

The history of Texas litigation on this subject also reveals conflicts with respect to the admission of evidence and the applicability and scope of the substantial evidence rule.¹⁹

The court in the *Trapp* case undertook to discuss the various conflicts and to lay down rules to be followed in the future. Probably the Texas Court again will vacillate. Nevertheless, a discussion of the law which the Texas Supreme Court considers applicable in that state today is desirable. The *Trapp* case held that a proceeding in the district court to test the validity of a rule, rate, or regulation of the Railroad Commission should not be in the nature of an ordinary civil suit. The parties at the trial may introduce any relevant legal testimony, but the court may decide only questions of law. The substantial evidence rule is applicable. To quote the language of the Court:

The court is not to substitute its discretion for that committed to the agency by the Legislature but is to sustain the agency if it is reasonably supported by substantial evidence before the court. If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached to justify its action, then the order must be set aside.²⁰

¹⁶139 Tex. 66, 161 S.W.(2d) 1022, 1028 (1941).

¹⁷Gulf Land Co. v. Atlantic Refining Co., cited *supra* note 14 (Order not to be set aside unless illegal, unreasonable, or arbitrary); Trapp v. Shell Oil Co., cited *supra* note 13 (Not an ordinary civil action). Accord: Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S.W.(2d) 364 (1933). See L. P. & B. Oil Corporation v. Gulf Oil Corporation, 115 S.W.(2d) 1034 (Tex.Civ.App. 1938), and Spear v. Humble Oil and Refining Co., 139 S.W.(2d) 212 (Tex.Civ.App. 1940).

¹⁸Gulf Land Co. v. Atlantic Refining Co., cited *supra* note 14, at 82.

¹⁹See dissenting opinion in Trapp v. Shell Oil Co., cited *supra* note 13, for an extended list of authorities.

²⁰Trapp v. Shell Oil Co., cited *supra* note 13, at 441.

While the Texas Courts have been the site of the most litigation, the problems encountered there are not confined to that state.²¹ Such problems will arise more and more frequently as the states strengthen their control of the conservation of oil and gas. They are important in Mississippi today due to the increase in the number of producing fields. As yet the exceptions to the general spacing rules have not become so great in Mississippi that the State Oil and Gas Board is confronted with the situation now existing in Texas, where more wells seem to be drilled as exceptions than pursuant to the general rule.²²

In a recent Mississippi case, *California Company v. State Oil and Gas Board*,²³ the question of judicial review of findings of the State Oil and Gas Board came before the Supreme Court for the first time.²⁴ The Board granted an exception to its general spacing rule and the adjoining lessee appealed to the Circuit Court, which granted a trial de novo. The Supreme Court reversed the judgment and remanded the case. Although the Court probably reached the correct result in this particular case, the language and reasoning of the Court open the door to the same uncertainty and confusion which has prevailed in Texas.

The Mississippi statute provides that any person affected by a determination of the Oil and Gas Board may appeal to the Circuit Court of Hinds County or the county in which the petitioner is engaged in drilling operations; that there the case shall be tried de novo; and that the court shall have the authority either to approve or to disapprove the action of the Board.²⁵ The Court in the *California Company* case had difficulty in reconciling the stipulation for a trial de novo with the provision that action of the court on review is to be limited to approving or disapproving the action of the Board. The Court finally decided to "read out" of the statute that part which provides for a trial de novo. This determination was reached on the strength of the

²¹Continental Inv. Corporation v. State Corporation Commission, 156 Kan. 858, 137 P.(2d) 166 (1943); Hunter Company v. McHugh, 202 La. 97, 11 So.(2d) 495 (1942). See Walker, *Developments in the Law of Oil and Gas in Texas During the War Years* (1946) 25 TEX. L. REV. 1.

²²See Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W.(2d) 967 (1937); Comment (1934) 13 TEX. L. REV. 119.

²³27 So.(2d) 542 (Miss. 1946), *sug. error overr.*, 28 So.(2d) 120 (Miss. 1947). See companion case of same title, 27 So.(2d) 549 (Miss. 1946) *sug. error overr.*, 28 So.(2d) 122 (Miss. 1947).

²⁴Superior Oil Company v. Mississippi Oil and Gas Board, now pending before Supreme Court of Mississippi. Case tried before Circuit Court of Hinds County where the judge stated: "... the complained of order will cause confiscation of property, will not prevent waste and is as a matter of law arbitrary and capricious and is not supported by substantial evidence."

²⁵MISS. CODE ANN. (1942) § 6136.

Court's interpretation of the provision granting a de novo trial as authorizing the trial court to substitute its findings and judgment for that of the inferior tribunal. Such an interpretation rendered the provision inconsistent with that part of the statute which limits the court's action to an approval or disapproval of the action of the Board. The language of the Supreme Court indicates that in this type of case the circuit court cannot determine questions of fact but must confine itself to the determination of questions of law. Under the *California Company* case the lower court will determine whether the Board has acted arbitrarily or capriciously, or if its findings are supported by substantial evidence. In arriving at this determination the court apparently may consider only those facts presented before the Board. If the action of the Board is found not to be arbitrary or capricious and further is supported by substantial evidence, the court must approve the Board action. On the other hand, if the court determines that the Board action is arbitrary or capricious or is not supported by substantial evidence, the court must disapprove the action taken and remand the cause to the Board.

The statute providing for review of action of the Oil and Gas Board, as interpreted by the Court in the *California Company* case, does not broaden the scope of judicial review which would have prevailed in the absence of such statute. In discussing court review of action by the Public Service Commission in granting a certificate of public convenience and necessity, the Mississippi Supreme Court stated in *Dixie Greyhound Lines, Inc. v. Public Service Commission*:

... a court of competent jurisdiction has the power to review any order made by an administrative Commission to determine whether it is supported by substantial evidence . . . or is arbitrary and capricious, beyond the power of the commission to make, or violates some statutory or constitutional right. . .²⁶

This language from the *Dixie Greyhound* case is merely a restatement of the Court's reasoning in *Illinois Central R. Co. v. Dodd*,²⁷ decided prior to the adoption of the Oil and Gas Conservation statutes. Theoretically, at least, the Legislature had knowledge of the existing state of jurisprudence as to judicial review of action by administrative agencies. It is submitted that the intention of the Legislature in the Oil and Gas statutes was to give the courts an opportunity to hear and determine the credibility of the testimony of the witnesses before approving or disapproving the action of the Board. The State Oil and Gas Board is

²⁶190 Miss. 704, 200 So. 579, *sug. error overr.*, 1 So.(2d) 489 (1941).

²⁷105 Miss. 23, 61 So. 743, 49 L.R.A.(N.S.) 565 (1913).

given authority to adopt and promulgate orders, rules, and regulations for the conservation of oil and gas but the statute contains no provision for a hearing as a condition precedent to their adoption.²⁸ The statute does provide that any interested person may petition the Board and obtain a hearing in a specified time, but by the time the hearing is obtained the order already will be in effect. The Board undoubtedly makes an independent *ex parte* finding of facts before issuing the order. The petitioning party therefore probably would have little chance to get the order changed after its issuance. The failure of the statute to require an adequate hearing before the Board indicates that the Legislature intended to provide a trial de novo in court. Further indications of the intention of the Legislature can be seen in its failure to grant the Board power to issue summons, its failure to provide a method of taking testimony under oath at the hearing, and in its failure to require the Board to keep a record of the testimony for subsequent use in court.²⁹

The Court in the *California Company* case seems to place too much emphasis on the fact that the conservation board is composed of experts skilled in making determinations of the type under review. The Court stated:

. . . To permit a trial de novo in the Circuit Court on a legislative or administrative decision of the State Oil and Gas Board, within the common acceptance of the term "tried de novo" would permit a party to withhold entirely any showing of his facts, as he contends them to be, from the original board of experts and of those charged with the responsibility of a great public policy of the State, and wait until appeal when he will make his full disclosure for the first time before non-experts in that field to determine as to the proper spacing of oil and gas wells.³⁰

The Mississippi statute which provides for the composition of the State Oil and Gas Board requires only one of the four members to be an expert in oil and gas.³¹ Two members of this Board constitute a quorum;³² orders therefore may be issued by members other than the Oil and Gas Supervisor, the only expert on the Board.³³

²⁸MISS. CODE ANN. (1942) § 6136.

²⁹See specially concurring opinion, *California Company v. State Oil and Gas Board*, 27 So. (2d) 542, 547-548 (Miss. 1946).

³⁰*Id.* at 546.

³¹MISS. CODE ANN. (1942) § 6132.

³²*Id.* § 6137.

³³*Id.* § 6133 (qualifications of State Oil Supervisor).

The Court in the *California Company* case actually confined the scope of judicial review to narrower limits than in the *Dixie Greyhound* case. In the latter decision the Court quoted with approval the following language of the United States Supreme Court in *Interstate Commerce Commission v. Union Pacific Railroad Company*:

... in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow, determines the validity of the exercise of power.³⁴

The quoting of this language by the Mississippi Court was a clear indication that as to so-called "constitutional" and "jurisdictional" facts,³⁵ the Mississippi circuit courts must make their own findings based upon a preponderance of evidence as in any other suit. The Mississippi Court in the *Dixie Greyhound* case seemed to recognize the substantial evidence rule as applicable to issues other than jurisdictional and constitutional issues, but seemed to insist upon an independent judicial determination of the latter issues. If these principles had been applied to the Oil and Gas cases, clearly under the Mississippi theory that a right in oil and gas in and under the land is a vested property right, the confiscation of such a right raises a constitutional issue. Thus the circuit court should have been required to determine the questions of fact in a trial de novo and to hear the evidence anew.

At several points in its opinion in the *California Company* case the Court stated that the permissible scope of review of the circuit court includes determinations

... as to whether or not the decision of said Board in that regard is supported by substantial evidence, is arbitrary or

³⁴222 U.S. 541, 32 S.Ct. 108, 56 L.Ed. 308 (1912).

³⁵See Kilroy, *The "Constitutional Jurisdictional" Fact Theory* (1942) 30 GEO. L. J. 781; Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of Constitutional Fact* (1932) 80 U. OF PA. L. REV. 1055.

capricious, beyond the power of the Board to make, or violates some constitutional right of the complaining party.³⁶

While such language is frequently employed by courts in discussing the scope of judicial review of determinations of administrative agencies only confusion can result from the failure to define each criterion. The Mississippi Supreme Court never has adequately discussed one of these criteria independently of the others.³⁷ Since the Court thus seems to mingle the requirements that the action of the Board must not be arbitrary or capricious and that it must be supported by substantial evidence, the determination of how much importance the Court attaches to the substantial evidence rule is impossible. That the Board has substantial evidence to support its findings does not necessarily mean that its action was not capricious or arbitrary. Thus, the standards laid down by the Supreme Court for the guidance of the lower court in determining the scope of judicial review are ambiguous and difficult to apply.³⁸

P. Gerald Adams

³⁶California Company v. State Oil and Gas Board, cited *supra* note 29, at 545, 546, 547.

³⁷See Dixie Greyhound Lines, Inc. v. Public Service Commission, cited *supra* note 26.

³⁸See Wade, *Recent Mississippi Oil and Gas Cases* (1947) 18 MISS. L. J. 243, 261, for a discussion of this problem.

AIRCRAFT ACCIDENTS—PRESUMPTION OF NEGLIGENCE GENERALLY FROM
SURROUNDING CIRCUMSTANCES—RELATION OF CARRIER AND
PASSENGER NECESSARY

In an action for wrongful death, the declaration alleged decedent's enrollment in Civilian Pilots Training Program, under which the defendant had contracted to give flight instruction; that student and instructor, who was a licensed pilot, undertook a flight in an airplane furnished by the defendant; and that while being operated in an ordinary manner, the airplane lost a wing, crashed, and killed the student, as a direct and proximate result of defendant's negligence in carelessly furnishing the occupants with an unsafe airplane. **Held:** Demurrer sustained for failure to allege that the relationship of a carrier and passenger, or master and servant, existed between the student and the defendant at the time of the crash. *Kasanof v. Embry-Riddle Co.*, 26 So.(2d) 889 (Fla. 1946).

The first cases involving accidents caused by airplanes held the owner absolutely liable for all injuries.¹ These cases comprised primarily injuries to persons, structures, and chattels on the surface of the earth, and were determined on the theory of trespass, that flying an airplane was engaging in an extrahazardous activity, any results of which the actor must be considered to have intended.² This doctrine is still extended to injuries or death to persons or chattels on the ground,³ but has no application to injuries or death to passengers in the aircraft at the time of the mishap.⁴

Where the harm is done to a passenger in the ship, the ordinary rules of negligence applicable to carriers of passengers apply.⁵ Passengers are considered to have assumed the risk of perils incident to the operation of such a conveyance, if the plane is operated with the highest degree of care and skill commensurate with practical operation.⁶ This duty of care includes not only the physical manipulation of the plane, but the selection of the craft itself, and the supply and maintenance of all its equipment, including motors and other working parts.⁷

Where specific allegations of negligence are not pleaded, it is within the province of the court to permit negligence to be presumed from the circumstances

¹*Rochester Gas & Elec. Corp. v. Dunlop*, 148 Misc. 849, 266 N.Y.S. 469, 1933 U.S.Av.R. 511 (1933); *Guille v. Swan*; 19 Johns. 381 (N.Y. 1822) (free balloon).

²See cases cited *supra* note 1; RESTATEMENT, TORTS (1938) § 520.

³UNIFORM AERONAUTICS ACT § 5, adopted by 22 states, not including Mississippi; *Reiber, Some Aspects of Air Carriers' Liability* (1946) 11 LAW AND CONTEMP. PROB. 524, 525.

⁴*Allison v. Standard Airlines*, 65 F.(2d) 668, 1930 U.S.Av.R. 292 (1930); *North American Acci. Ins. Co. v. Pitts*, 213 Ala. 102, 104 So. 21, 40 A.L.R. 1171 (1925); *Kamienski v. Bluebird Air Service*, 321 Ill.App. 340, 33 N.E.(2d) 131 (1944); *Goodheart v. American Airlines*, 1 N.Y.S.(2d) 288, 1938 U.S.Av.R. 148 (1937).

⁵*Wilson v. Colonial Air Transport*, 278 Mass. 420, 180 N.E. 212, 83 A.L.R. 329 (1932); cases cited *supra* note 4.

⁶*Conklin v. Canadian Colonial Airways*, 266 N.Y. 244, 194 N.E. 692, 1935 U.S.Av.R. 97 (1935); *Hamilton v. O'Toole*, 1930 U.S.Av.R. 133 (Mass.Superior 1927), and *Law v. Transcontinental Air Transport*, 1931 U.S.Av.R. 205 (E.D.Pa. 1931) [both as reported in (1933) 83 A.L.R. 360].

⁷*Law v. Transcontinental Air Transport*, *supra* note 6; *Allison v. Standard Airlines*, *Kamienski v. Bluebird Air Service*, both *supra* note 4.

surrounding the injury,⁸ i.e., to presume or infer that the duty of care required has not been met. In so presuming, it was pointed out early⁹ that there is obvious injustice in limiting the degree of care required of this fast, gas-driven, air-borne carrier to that of a horse-drawn wagon.¹⁰ The more dangerous the potentialities of the mode of conveyance, the more care should be required in its maintenance and operation.¹¹ This is manifestly justified in airplane cases by the complete control of the owner and operator, and the serious consequences of any negligence on their part.

Although this duty to use a greater degree of care than is required in other types of conveyances has been universally accepted by all jurisdictions, only one of the reported cases has granted a presumption where the passenger was a mere guest in the airplane.¹² In each of the remainder, the defendant was at least a private carrier for hire.¹³ There is a strong dissenting opinion, however, that the relationship between the owner and passenger has no effect on the duty imposed on aircraft operators.¹⁴

Even where the carrier-passenger relation is established, the courts permit negligence to be presumed only where four basic elements are present: an accident such as does not ordinarily occur without the presence of negligence; the instrumentality under complete control of the defendant; the complainant being in no position to ascertain the cause of the disaster; and the defendant occupying a superior position of knowledge, or possible knowledge, of the primary cause.¹⁵ If these factors are present, the nature of the crash is immaterial, whether materiel failure,¹⁶ collision with another aircraft,¹⁷ violation of traffic regulations,¹⁸ or purely unexplained.¹⁹ On the contrary, the absence of any one of the factors has precluded a presumption, as where the flight was a test-hop,²⁰ the passengers were licensed pilots themselves,²¹ materiel maintenance was not under the control of the defendant,²² or the weather was such as to indicate the predominant possibility of a concurrent Act of God.²³ Courts also generally hold that pleading specific negligence will refute a presumption.²⁴

⁸Bates v. City of McComb, 181 Miss. 336, 179 So. 737 (1938); Jackson v. Edwards, 144 Fla. 187, 192 So. 833 (1940); Genero v. Ewing, 176 Wash. 78, 28 P.(2d) 116 (1934). This is the well-known doctrine of *res ipsa loquitur*.

⁹Foot v. Northwest Airways, 1931 U.S.Av.R. 66 (D.Minn. 1930) [as reported in (1933) 83 A.L.R. 363].

¹⁰Southern R. Co. v. Cunningham, 123 Ga. 90, 50 S.E. 979 (1905); Foot v. Northwest Airways, *supra* note 9.

¹¹Cates v. Hall, 171 N.C. 360, 88 S.E. 524 (1916).

¹²Seaman v. Curtiss-Wright Flying Service, 231 App.Div. 867, 247 N.Y.S. 251, 1931 U.S.Av.R. 229 (1931).

¹³See cases cited *supra* note 7 and *infra* notes 15-19.

¹⁴Herndon v. Gregory, 190 Ark. 702, 81 S.W.(2d) 849, 82 S.W.(2d) 244 (1934) (dissenting opinion).

¹⁵Parker v. Granger, 4 Cal.(2d) 668, 52 P.(2d) 226 (1935).

¹⁶Kamienski v. Bluebird Air Service, *supra* note 4.

¹⁷Smith v. O'Donnell, 215 Cal. 714, 12 P.(2d) 933 (1931).

¹⁸Ziser v. Colonial Western Airways, 10 N.J.Misc. 1118, 162 A. 591 (1932).

¹⁹Goodheart v. American Airlines, *supra* note 4; Ziser v. Colonial Western Airways, *supra* note 18.

²⁰Cohn v. United Airlines Transport, 17 F.Supp. 865 (D.Wyo. 1937).

²¹Budgett v. Soo Skyways, 64 S.D. 243, 266 N.W. 253 (1936).

²²Boele v. Colonial Western Airways, 110 N.J.L. 76, 164 A. 436, 1933 U.S.Av.R. 78 (1932); Wilson v. Colonial Air Transport, *supra* note 5.

²³Morrison v. LeTourneau Co. of Ga., 138 F.(2d) 339 (C.C.A. 5th, 1944).

²⁴McCusker v. Curtiss-Wright Flying Service, 269 Ill.App. 502, 1932 U.S.Av.R.

Final determination of this case should be of much interest, in light of the increased travel by air, the probable resultant increase of actions of this type, and the scarcity of decisions on the subject. The legislative trend has been toward strict but rebuttable liability for air carriers of passengers.²⁵ International air carriers are already held to that responsibility.²⁶ Probably the courts themselves should be more lenient in allowing presumptions of negligence in airplane cases, for it is seldom that the injured party has any means of determining the specific negligence causing the accident.²⁷

Loyd L. Beacham, Jr.

CONFLICT OF LAWS—JURISDICTION TO DIVORCE—FULL FAITH AND CREDIT TO FOREIGN DIVORCE DECREES

Husband and wife were domiciled in Mississippi. Husband left Mississippi, went to Reno, Nevada, and, after remaining there for the required six week period of residence,¹ obtained a divorce from his wife. The wife subsequently brought suit in Mississippi to set aside the Nevada divorce decree on the ground that the husband did not have actual bona fide domicile in the "sister state" when he procured the divorce. HELD: If residence in Nevada by the spouse seeking divorce was not with a bona fide intent to establish domicile *animo manendi*, the Nevada court was without jurisdiction, and therefore its decree was not entitled to full faith and credit. The evidence shows that the husband herein did not have bona fide intent to establish domicile *animo manendi* at the time he procured the divorce. *Hall v. Hall*, 24 So.(2d) 347 (Miss. 1946).

The Supreme Court of Mississippi, in the instant case, cited and followed the recent decision of the Supreme Court of the United States in *Williams v. North*

205 (1931); *Miller v. English*, 43 S.W.(2d) 642, 1932 U.S.Av.R. 153 (Tex.Civ.App. 1931); *Foot v. Northwest Airways*, *supra* note 9.

²⁵Conn. Laws 1911, c.86; §11, repealed, Conn. Laws 1925, c.249, Conn. Laws 1927, c.324; Mass. Acts 1913, c.663, §6, repealed, Mass. Acts 1919, c.306, Mass. Acts 1922, c.535, Mass. Acts 1925, c.189; Proposed Uniform Aeronautical Code (4th Tent. Draft 1938) Art.III, §302, introduced in 78th Cong. as H.R.674 "Air Carrier Liability Act." Similar bill introduced in 79th Cong. as H.R.532 "O'Hara Bill," broadened and reintroduced as H.R.4912. All died in committees.

²⁶"Warsaw Convention" Art.17, c.III (1929), ratified by United States Senate (1934), and proclaimed by President (1934); *Villa v. PanAmerican Airways*, 66 F.Supp. 907 (Puerto Rico 1946); *Wyman v. PanAmerican Airways*, 43 N.Y.S.(2d) 420, 1943 U.S.Av.R. 1 (1943); *Grein v. Imperial Airways*, 1 K.B. 50, 53 Lloyd's L.&R. 51, 1936 U.S.Av.R. 184 (1935).

²⁷For a further discussion of the liability of air carriers, see Witherspoon, *What Care Is Required of a Carrier by Air?* (1946) 17 Miss. L. J. 221.

¹Nevada law requires a physical presence of six weeks in the county, with an intention to establish permanent residence there. NEV. COMP. LAWS §9460. While the Nevada courts hold that there must be a present intention to remain, if not permanently, at least for an indefinite period [*Latterner v. Latterner*, 51 Nev. 285, 274 P. 194 (1929)], they view with indulgence the evidences of such intent, but cannot impose their standards upon the courts of the state in which the contract of marriage was made, and to which the latter state remains always an interested and solicitous party.

Carolina, II,² and an earlier decision of the Supreme Court of Mississippi in *Miller v. Miller*.³ The second *Williams* case, decided in 1945, has caused considerable comment among the legal writers of this country.⁴ Although criticized by many recognized authorities, it is nevertheless the law today on this subject.⁵ The Mississippi Supreme Court, in the *Miller* case, reached the same result a decade before the second *Williams* case established the present law, which is that the court in which the divorce is being challenged may decide for itself the question of domicile *vel non* at the divorce forum.

Alvin N. London

CONSTITUTIONAL LAW—WAIVER OF THE RIGHT TO BE HEARD BY COUNSEL IN CAPITAL CASES

In 1928 the petitioner, a thirty year old negro man of average mentality but no schooling, entered a plea of guilty to a charge of murder and was sentenced to 99 years imprisonment. In 1945 a petition to the Illinois Supreme Court for a writ of error was filed. The accused alleges in this petition that he was arrested, held twelve days incommunicado, then indicted for murder, arraigned three days later, and entered a plea of guilty after reading a five page indictment. He was allowed a hearing in the trial court upon the question of "mitigation or aggravation" of the crime to which he had pleaded guilty. No counsel was appointed until this last-named phase of the proceedings. Ten days later he was sentenced. The judgment against the petitioner states that the consequences of his plea were explained to him and that he was informed of his right to have counsel appointed, but that he still expressed a desire to plead guilty. This judgment followed the language of the Illinois Statute.¹ The Illinois Supreme Court affirmed the conviction,² and the Supreme Court of the United States reviewed the proceedings on a writ of certiorari. HELD: On the record before the court no violation of the accused's right to assistance of counsel was shown. *Carter v. People of Illinois*, 67 S.Ct. 216 (U.S. 1946).

That there may be a voluntary waiver in criminal cases of a constitutional right which is personal to the accused is clearly established throughout the decisions of the courts of the United States.³ This applies to the right to counsel as well as to certain other rights guaranteed by the constitution.⁴

²325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366 (1945). In this case, the Supreme Court affirmed, over three dissents, a decision by the North Carolina courts to the effect that a Nevada divorce decree was not valid, on the basis of a finding of no domicile at the divorce forum of the parties obtaining such divorces in Nevada.

³173 Miss. 44, 159 So. 112 (1935); discussed fully in Note, *Foreign Divorce Jurisdiction—Full Faith and Credit* (1936) 8 Miss.L.J. 397.

⁴See, for example: Lorenzen, *Extraterritorial Divorce: Williams v. North Carolina II* (1945) 54 YALE L.J. 799; Powell, *And Repent at Leisure* (1945) 58 HARV.L.REV. 930; Stumberg, *Jurisdiction to Divorce* (1946) 24 TEX.L.REV. 119; Stumberg, *Constitutional Decisions During the War Years* (1947) 18 Miss.L.J. 183, 199-201.

⁵For a summary of decisions on this subject, see Note (1945) 157 A.L.R. 1399, supplementing Note (1943) 143 A.L.R. 1294.

¹ILL. REV. STAT. (1945) c. 38, par. 732.

²*Carter v. People of Illinois*, 391 Ill. 594, 63 N.E.(2d) 763 (1945).

³WEAVER, *CONSTITUTIONAL LAW AND ITS ADMINISTRATION* (1946) 445.

⁴*Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

An accused entering a plea of guilty in a federal court is entitled to the advice of counsel under the Sixth Amendment of the Constitution of the United States,⁵ and an abridgement of the right to counsel by state courts is a violation of the Due Process Clause of the Fourteenth Amendment.⁶ Furthermore, there may be a duty upon the trial court to appoint counsel to assist the accused even though he does not request it.⁷ Every reasonable presumption against a waiver of fundamental rights is indulged.⁸ To constitute a valid waiver of a constitutional right there must be the express and intelligent consent of the accused,⁹ and the determination of whether there has been an intelligent waiver must depend in each case upon the particular facts and circumstances surrounding the case,¹⁰ including the background, experience and intelligence of the accused.¹¹ Where the allegations of the petitioner would be sufficient to show that he was deprived of the right to counsel, especially where convicted of a capital crime,¹² the cause should be remanded to the state courts to determine the truth of these allegations.¹³

Where there is a duty on the court to appoint counsel,¹⁴ it is not discharged by an appointment at such time or under such circumstances as to prevent effective aid in the preparation and trial of the case.¹⁵ The accused is generally held to have the right to be represented by counsel at all stages of the proceedings in capital offenses.¹⁶

⁵Walker v. Johnson, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941).

⁶Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 457, 77 L.Ed. 680, 84 A.L.R. 527 (1932).

⁷Rice v. Olson, 324 U.S. 786, 65 S.Ct. 989, 89 L.Ed. 1367 (1945).

⁸Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941).

⁹Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263 (1930) (Waiver of a jury of twelve men).

¹⁰Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938).

¹¹Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 457, 77 L.Ed. 680, 84 A.L.R. 527 (1932).

¹²Tompkins v. Missouri, 323 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407 (1944).

¹³Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941). This statement taken alone would seem to be grounds for remanding the principal case, but the situation in the *Smith* Case involved a habeas corpus proceeding in which the court below had not heard evidence because of an opinion that habeas corpus would not lie, whereas in the principal case there is a writ of error, and the court was following Illinois Appellate Procedure in its review.

¹⁴This duty is derived from the Sixth Amendment of the United States Constitution where the proceedings are in a federal court, and in state proceedings the duty may be derived either from the state constitutions or from statutes on the subject. In the following decisions the state constitution was held to provide the duty: Wilcoxon v. Aldredge, 192 Ga. 634, 15 S.E.(2d) 873, 146 A.L.R. 365 (1941); Loftus v. Amrine, 152 Kan. 464, 105 P.(2d) 890 (1941); People *ex rel.* Moore v. Hunt, 258 App.Div. 24, 16 N.Y.S.(2d) 25 (1939); *Ex parte* Barrett, 67 Okla.Crim. Rep. 300, 94 P.(2d) 18 (1939). Each of these cases followed and relied on Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938). In Mississippi the duty comes from Miss. CODE ANN. (1942) § 2505, and has been construed by the Mississippi Court to be mandatory upon the courts in capital cases. Porter v. State, 193 Miss. 774, 10 So.(2d) 377 (1942); Brooks v. State, 178 Miss. 568, 173 So. 451 (1936).

¹⁵Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 457, 77 L.Ed. 680, 84 A.L.R. 527 (1932).

¹⁶"The guiding hand of counsel is required at every step of the proceeding against the accused . . . even where he is an intelligent layman, . . . the need is even more apparent where he is ignorant and illiterate." Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945).

Where a party accused of a state crime is not afforded the right to the assistance of counsel and is unable to obtain adjudication of this right in the state courts, a direct petition to a federal district court for a writ of habeas corpus would be proper.¹⁷ The theory under which this writ is allowed to issue is that the abrogation of this right of the petitioner has deprived the court under which he was tried of jurisdiction.¹⁸ In such a proceeding there is a presumption of regularity in the proceedings of the trial court¹⁹ but this presumption can be overcome by the introduction of evidence to show that a constitutional right has been abridged, the burden of proof being on the petitioner to show that he did not competently and intelligently waive his right to the assistance of counsel.²⁰ It is well settled that if the proper relief is not forthcoming in the state courts by habeas corpus or other appropriate state procedure, the petitioner may either appeal to the Supreme Court of the United States from the highest court of his state, or may directly petition a federal district court for relief.²¹

The right to the assistance of counsel is one of peculiar sacredness, and demands the closest scrutiny of the Supreme Court of the United States when it is alleged to have been violated.²²

Both the Illinois Court and the majority opinion of the United States Supreme Court confined their decisions to the facts as contained in the common law record. This record does not disclose any facts which show that the petitioner was deprived of his constitutional right to counsel, and that he did not effectively waive this right. Therefore, the allegations on which he relies were not considered by this court. The Supreme Court did not hold this to be an effective waiver of the accused's right to counsel for his defense, but rather that on the method chosen by the accused for the adjudication of his rights this question cannot be determined. As the court indicated, the question can be determined only when it is properly presented,²³ presumably through a petition for a writ of habeas corpus in which evidence can be presented to support the allegations of the petitioner.

W. E. McIntyre, Jr.

¹⁷*Wilson v. Lanagan*, 99 F.(2d) 455 (C.C.A. 1st, 1938 *cert. denied*, 206 U.S. 634, 59 S.Ct. 486, 83 L.Ed. 1035 (1939)). But the petitioner must have exhausted his state remedies before such petition will be allowed.

¹⁸*Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938).

¹⁹*Walker v. Johnson*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941).

²⁰*Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938).

²¹*Smith v. O'Grady*, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941).

²²*Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1939).

²³*Carter v. People of Illinois*, 67 S.Ct. 216, 220 (U.S. 1946).

DIVORCE—DENIAL OF THE DOCTRINE OF RECRIMINATION AS A BAR TO DIVORCE

Plaintiff sought a divorce in 1942 on grounds of incompatibility, he and defendant spouse having been separated since 1937 and she having been awarded separate maintenance in 1938. In the absence of statutory provisions regarding the doctrine of recrimination as a bar to the right of divorce, defendant raised that doctrine by a cross-complaint in which she alleged adultery on the part of plaintiff during the period of their separation. HELD: Divorce will not be denied on the doctrine of recrimination. Plaintiff's alleged adultery after separation was immaterial. *Pavletich v. Pavletich et al.*, 50 N.M. 224, 174 P.(2d) 826 (1946).

The doctrine of recrimination as a bar to plaintiff's right to absolute divorce, which doctrine the subject case denies, has been generally followed in the United States and has been followed by the Mississippi Supreme Court as recently as the current calendar year.¹ This defense stems from the Roman property law of the 12th century, and has come to this country by way of English canon law.² It is regulated by statute in varying degrees by thirty states³ and, in the absence of statutory provisions, has been tenaciously followed in the remaining eighteen states,⁴ including Mississippi.⁵ The paradoxical result of the doctrine is that if both parties to a marriage have a cause for divorce, neither party may be granted a divorce.

The legal concept usually advanced in support of the doctrine is the maxim of equity that he who comes into equity must come with clean hands.⁶ Divorce is said to be a remedy for an innocent spouse, hence the courts must deny a decree

¹*Oberlin v. Oberlin*, 29 So.(2d) 82 (Miss. 1947).

²*Proctor v. Proctor*, 2 Hag.Con. 292 (1819); 2 BISHOP, MARRIAGE AND DIVORCE (4th ed. 1864) 76; Beamer, *The Doctrine of Recrimination in Divorce Proceedings* (1942) 10 KAN. CITY L. REV. 213, 216, 220-229.

³There is little uniformity in the statutory provisions among the states. Fourteen make adultery a recriminatory defense to a divorce on grounds of adultery; six make any statutory cause of divorce a defense to any other cause; three make any particular cause a defense to a divorce sought on the same cause; three make adultery a defense to any statutory cause; two make an "equal wrong" a defense; Arkansas makes adultery a defense to any cause, and a particular statutory cause a defense to the same cause; and Georgia makes adultery, desertion, cruel treatment and intoxication a defense to the same conduct. 2 VERNIER, AMERICAN FAMILY LAWS (1932) § 78.

⁴*Id.* at 83. Cf. *Hove v. Hove*, 219 Minn. 590, 18 N.W.(2d) 580 (1945) which sustains a recriminatory defense on grounds other than adultery despite a statute which established the defense in cases of adultery only.

⁵*Oberlin v. Oberlin*, 29 So.(2d) 82 (Miss. 1947); *Long v. Long*, 160 Miss. 492, 135 So. 204 (1931); *Dunn v. Dunn*, 156 Miss. 132, 125 So. 562 (1930); *Banks v. Banks*, 118 Miss. 783, 79 So. 841 (1918); AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI (1935) § 79.

⁶*Vaughn v. Vaughn*, 66 F.(2d) 804 (App.D.C. 1933); *Nesheim v. Nesheim*, 203 Ill.App. 257, 12 N.E.(2d) 222 (1938); *Rigsby v. Rigsby*, 266 Ky. 296, 97 S.W.(2d) 335 (1936); *Roxborough v. Roxborough*, 269 Mich. 569, 257 N.W. 747 (1934); *Blankenship v. Blankenship*, 51 Nev. 356, 276 P. 9 (1929); *Rapp v. Rapp*, 67 N.J.E. 236, 58 A. 167 (1904); *Chavez v. Chavez*, 39 N.M. 480, 50 P.(2d) 264 (1935) (overruled by the subject case); *Carmichael v. Carmichael*, 106 Ore. 198, 211 P. 916 (1923); *Mathewson v. Mathewson*, 18 R.I. 455, 28 A. 801 (1894); AMIS, *supra* note 5, § 79.

to a plaintiff who is himself *in pari delicto*.⁷ This position is open to criticism on the ground that divorce is not, historically, a question of equity.⁸ In the absence of ecclesiastical courts in this country the matter has been assigned by statute to the courts of chancery; but no equitable interest is involved,⁹ and there is an inconsistency in the logic which applies to divorce proceedings a rule of equity. Even if divorce matters be considered as bound by rules of equity, the general rule that courts will leave parties *in pari delicto* where they are found is not an unyielding rule in other fields of law,¹⁰ and this raises a doubt that it should be an absolute bar in a divorce action.

A second reason given for denying a divorce in such a situation is that by common law a party to a civil contract—marital or otherwise—who seeks a rescission for non-performance by the other party must of necessity perform the conditions on his own part before he will be entitled to such relief.¹¹ However, the marriage contract is not generally looked upon as just another civil contract, but rather as a contract *sui generis*. As such, it need not be measured in all particulars by the same standards as other contracts.¹²

The implication of both of the above concepts is that recrimination is partially punitive in its nature.¹³ Often quoted in this regard is the language of Chancellor Walworth of New York who, in denying a divorce when each spouse charged the other with adultery, stated that such parties were "suitable and proper companions for each other."¹⁴ Similar is the thought of an English judge that the "parties may

⁷Widders v. Widders, 207 Ark. 596, 182 S.W.(2d) 209 (1944); Levy v. Levy, 388 Ill. 179, 57 N.E.(2d) 366 (1944); Gormley v. Gormley, 161 La. 121, 108 So. 307 (1926); Dougherty v. Dougherty, 48 A.(2d) 451 (Md. 1946); Andris v. Andris, 234 Mo.App. 48, 109 S.W.(2d) 707 (1937); Hawley v. Hawley, 101 Ore. 649, 199 P. 589 (1921); Daly v. Daly, 137 Pa.Super. 403, 9 A.(2d) 192 (1939).

⁸"It is well settled that in this country the jurisdiction of courts of equity to hear and determine divorce cases is conferred only by statute. While courts of equity may exercise their powers as such within the limits of the jurisdiction conferred by statute, such jurisdiction depends upon the grant of the statute and not upon general equity powers." Smith v. Johnson, 321 Ill. 134, 151 N.E. 550, 552 (1926). "A divorce court is not a court of equity." Wilson, C.J., concurring in Thorem v. Thorem, 188 Minn. 153, 246 N.W. 674, 675 (1933).

⁹Zacharias, *Recrimination in the Divorce Law of Illinois* (1936) 14 CHI-KENT L. REV. 217, 222, 223.

¹⁰Greenberg v. Evening Post Ass'n., 91 Conn. 371, 99 A. 1037 (1917); Darnell-Love Lumber Co. v. Wiggs, 144 Tenn. 113, 230 S.W. 391 (1921); KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (1926) §§ 259, 273-275; WOODWARD, THE LAW OF QUASI-CONTRACTS (1913) §§ 138-143.

¹¹Oberlin v. Oberlin, 29 So.(2d) 82 (Miss. 1947); Widders v. Widders, 207 Ark. 596, 182 S.W.(2d) 209 (1944); Comfort v. Comfort, 105 P.(2d) 166 (Cal.App. 1940); Church v. Church, 16 R.I. 667, 19 A. 244 (1890); Pease v. Pease, 72 Wis. 136, 39 N.W. 133 (1888); AMIS, *supra* note 5, § 79.

¹²Lewis v. Tapman, 90 Md. 294, 45 A. 459 (1900); Shepler v. Chamberlain, 226 Mich. 112, 197 N.W. 372 (1924); Fearon v. Treanor, 272 N.Y. 268, 5 N.E.(2d) 815 (1936).

¹³But cf.: "From a social point of view it is hard to defend a rule that recrimination is an absolute bar to the granting of a divorce. It requires parties who are guilty of conduct which makes their marriage impossible of success to continue their marital relationship as a sort of punishment for their sins." Vanderhuff v. Vanderhuff, 79 App.D.C. 153, 144 F.(2d) 509 (1944). "Divorces are granted for reasons of policy and not as a punishment." Justice Brickley, concurring in Chavez v. Chavez, 39 N.M. 480, 50 P.(2d) 264 (1935) (overruled by subject case).

¹⁴Wood v. Wood, 2 Paige 108, 111 (N.Y. 1830).

live together, and find sources of mutual forgiveness in the humiliation of mutual guilt."¹⁵

Critics of the doctrine of recrimination argue along lines of social desirability and public policy. Historically the doctrine has been defended as one which protects the property rights of the defendant and which tends to hold the family unit together.¹⁶ In its actual application, however, it is thought that the doctrine must fall far short of attaining the second of the above mentioned aims.¹⁷ It is said that as a practical matter the doctrine is seldom invoked for most divorce suits are uncontested;¹⁸ yet the existence of the doctrine may lead to perjury and collusion¹⁹ for the doctrine will be invoked by the court if evidence of a cause of divorce on the part of the defendant appears from the testimony, irrespective of the defendant's desire not to plead the doctrine.²⁰ Whether under currently extended statutory grounds for divorce there is ever an innocent spouse in a divorce suit is an additional question which has been suggested, particularly in cases of incompatibility.²¹ It is alleged that the doctrine, when invoked, is frequently the result of a malicious desire on the part of the defendant to bar the divorce to the plaintiff.²² And the paradoxical nature of the doctrine has been pointed to as a rule of law which tends to lower the layman's respect for the legal system under which he lives.²³

Three solutions as an alternative to the present doctrine of recrimination have been advanced: 1) grant a divorce to both parties;²⁴ 2) the doctrine of comparative rectitude, which results in a decree for the party least at fault;²⁵ and 3) serving

¹⁵Lord Stowell in *Beeby v. Beeby*, 1 Hagg.Ecc. 789, 790 (1799).

¹⁶Beamer, *supra* note 2, at 213.

¹⁷The judge of the lower court is quoted in the subject case as follows: "I cannot feel that when parties are living separate and apart, and one or the other or both are guilty of adultery, that the courts can serve any good purpose by forcing them to live for the rest of their lives as husband and wife, separate and apart, and thereby create a situation which can do nothing but cause sorrow and unhappiness and an intolerable moral situation. . . . [Prior cases hold], more or less, if both parties are guilty a court should hold them together whether they want to live together or ever intend to live together. I think it is a cruel and inhuman law . . ." *Pavletich v. Pavletich*, 50 N.M. 224, 174 P.(2d) 826, 829 (1946). And Beamer, *supra* note 2, at 249 has referred to a "slowly awakening realization that denial of divorce seldom restores life to families sociologically dead when they come into court, and that if anything is preserved it is but the dead and empty shell of what has been and is no longer—a realization that upon the refusal of divorce, those things which cannot be done legally are done illegally, those which cannot be done openly are done clandestinely . . ."

¹⁸Zacharias, *supra* note 9, at 217, 252.

¹⁹Bradway, *The Myth of the Innocent Spouse* (1937) 11 TULANE L. REV. 377, 378; Zacharias, *supra* note 9, at 238.

²⁰Redington v. Redington, 2 Colo.A. 8, 29 P. 811 (1892); Dougherty v. Dougherty, 48 A.(2d) 451 (Md. 1946); Dunn v. Dunn, 156 Miss. 132, 125 So. 562 (1930); Rapp v. Rapp, 67 N.J.E. 236, 58 A. 167 (1904).

²¹Concurring opinion of Hudspeth, J., in *Chavez v. Chavez*, 39 N.M. 480, 50 P.(2d) 264, 267 (1935) (overruled by the subject case); Bradway, *supra* note 19, at 383; Zacharias, *supra* note 9, at 237.

²²Bradway, *supra* note 19, at 385.

²³Hudspeth, J., concurring in *Chavez v. Chavez*, 39 N.M. 480, 50 P.(2d) 264, 267 (1935) (overruled by the subject case); Zacharias, *supra* note 9, at 252.

²⁴Flagg v. Flagg, 192 Wash. 679, 74 P.(2d) 189 (1937). In *Conant v. Conant*, 10 Cal. 249 (1858) this is criticized as an "anomalous proceeding."

²⁵Longinotti v. Longinotti, 169 Ark. 1001, 277 S.W. 41 (1925); Weiss v. Weiss, 174 Mich. 431, 140 N.W. 587 (1913); Goings v. Goings, 90 Neb. 148, 133 N.W. 199 (1911); Johnsen v. Johnsen, 78 Wash. 423, 139 P. 189 (1914); Dearth v. Dearth, 141 Pa.Super. 344, 15 A.(2d) 37 (1940) *semble*. *Contra*: Legatski v. Legatski, 230

the public good by granting a decree to the plaintiff, he being the party who seeks to live within the law by bringing to the court's attention a marital relationship which has been violated on both sides and should be, for the public good, dissolved. The latter seems to be the position of the court in the subject case.

It is submitted that the refusal of the court to follow the doctrine of re-crimination on grounds of public policy and social desirability is the better, even though the minority, rule. However, in light of the doctrine's long acceptance in this country there is much weight in the contention of the dissent in the subject case to the effect that such a reversal is more properly a matter for legislative action than for judicial determination.²⁶

Lampkin H. Butts

INTERNAL REVENUE — EXEMPTION OF "AGRICULTURAL LABOR" FROM SOCIAL SECURITY TAXATION — EXTENT OF EXEMPTION

Taxpayer owned a breeding farm and sold dairy products on milk routes and on the farm. He brought suit to recover Social Security taxes paid on wages of his farm employees. One of the employees worked in a "Dairy Inn" on the farm and sold milk and other dairy products over the counter in addition to keeping various records and performing other clerical work. This employee was trained for that work on the farm and had no professional training. The other employees, in various capacities, were engaged in milking, bottling, processing milk products, and delivering the milk. HELD: The taxpayer was not liable for contribution on the wages paid his employees. Even the employee in the Dairy Inn was engaged in "agricultural labor"; she was not a professional nor skilled bookkeeper. *Kenan v. McGowan*, 69 F.Supp. 95 (W.D.N.Y. 1946).

The Social Security Act of 1936 requires employers to pay an excise tax based on wages of their employees.¹ The tax applies to all labor with the exception, among others, of "agricultural labor,"² which was exempted to avoid placing a tax burden on the agricultural industry.³ Agricultural labor was not defined by statute until 1939, when the act was amended;⁴ the amendment did not codify the definitions previously evolved by the courts.⁵

Mich. 186, 203 N.W. 69 (1924). For the effect of a statute leaving to the discretion of the court the award or denial of a decree on such conditions, see *Lassen v. Lassen*, 134 Kan. 436, 7 P.(2d) 120 (1932); *Panther v. Panther*, 147 Okla. 131, 295 P. 219 (1931).

²⁶*Pavletich v. Pavletich*, 50 N.M. 224, 174 P.(2d) 826, 832 (1946).

¹⁴² U.S.C.A. § 1004.

²⁴² U.S.C.A. § 1011(b). "The term 'employment' means any service of whatever nature, performed within the United States by an employee for his employer, except—(1) Agricultural labor . . ."

³*Burger v. Social Security Bd.*, 66 F.Supp. 619 (S.D. Cal. 1946).

⁴²⁶ U.S.C.A. § 1426(h). "The term 'agricultural labor' includes all services performed—(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural . . . commodity . . . (2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm, its tools and equipment . . . if the major part of such service is performed on a farm."

⁵*Larson v. Ives Dairy Co.*, 154 F.(2d) 701 (C.C.A. 5th, 1946); *Fosgate Co. v. U.S.*, 125 F.(2d) 775 (C.C.A. 5th, 1942).

One major requirement for exemption from Social Security taxation as "agricultural labor" is that the "main or dominant purpose" of the farm on which the labor is performed be agricultural.⁶ The products of such farm will determine whether its purpose is agricultural.⁷ Where a "farm" is engaged in both agricultural and non-agricultural activities, the dominant purpose of the farm is determined by the activity yielding the larger income.⁸

A second requirement for exemption is that the labor be performed on the farm proper, except where performance elsewhere is essential to the operation of the farm as such and the labor is done "in connection with" an agricultural activity.⁹ Labor performed in the delivery of farm products to market is exempt from taxation, where the products are completely processed on the farm. Perhaps the courts wish to encourage farm processing. On the other hand, where additional processing is to be done by purchasers before marketing, delivery to market is not agricultural labor.¹⁰

Even under the act as amended, courts generally have held that agricultural labor is not to be construed strictly and is not to be limited to work done to the soil.¹¹ Any work which is incidental to agriculture and performed "in connection with" the operation and management of a farm as such has been held to be agricultural.¹² Such work includes that performed by carpenters, mechanics, blacksmiths, cattle-show men, and workers in farm processing sheds.¹³ To be classified as agricultural, labor performed by employees in processing sheds must be limited to their employer's products.¹⁴ In cases involving cooperative associations, however, a more liberal rule is applied, the "Fifty Percent Rule." If one-half or more of the products processed belongs to members of the association, labor performed with respect to such products is agricultural.¹⁵

The courts have not extended the definition of agricultural labor to include general office work, even though such work is performed on a farm.¹⁶ The reasoning is that clerical workers are skilled and specially trained, that their work is pro-

⁶Latimer v. U.S., 52 F.Supp. 228 (S.D. Cal. 1943).

⁷Birmingham v. Rucker's Breeding Farm, 152 F.(2d) 837 (C.C.A. 8th, 1945); U.S. v. Turner Turpentine Co., 111 F.(2d) 400 (C.A.A. 5th, 1940); Fromm Bros. v. U.S., 35 F.Supp. 145 (W.D. Wis. 1940).

⁸Kenan v. McGowan, 69 F.Supp. 95, 98 (W.D.N.Y. 1946).

⁹Batt v. U.S., 151 F.(2d) 949 (C.C.A. 9th, 1945); Lake Region Packing Ass'n. v. U.S., 146 F.(2d) 157 (C.C.A. 5th, 1944); Latimer v. U.S., 52 F.Supp. 228 (S.D. Cal. 1943).

¹⁰Latimer v. U.S., 52 F.Supp. 228 (S.D. Cal. 1943).

¹¹Irvine v. Cal. Employment Comm., 165 P.(2d) 908 (Cal. 1946); H. Duys & Co. v. Tone, 125 Conn. 300, 5 A.(2d) 23 (1939).

¹²Jones v. Gaylord Guernsey Farms, 128 F.(2d) 1008 (C.C.A. 10th, 1942); U.S. v. Turner Turpentine Co., 111 F.(2d) 400 (C.C.A. 5th, 1940); Navar v. U.S., 62 F.Supp. 344 (W.D. Tex. 1945); Latimer v. U.S., 52 F.Supp. 228 (S.D. Cal. 1943).

¹³U.S. v. Colfax Grain Growers, 157 F.(2d) 633 (C.A.A. 9th, 1946); Jones v. Gaylord Guernsey Farms, 128 F.(2d) 1008 (C.C.A. 10th, 1942); Navar v. U.S., 62 F.Supp. 344 (W.D. Tex. 1945); Latimer v. U.S., 52 F.Supp. 228 (S.D. Cal. 1943).

¹⁴Jones v. Gaylord Guernsey Farms, 128 F.(2d) 1008 (C.C.A. 10th, 1942); Latimer v. U.S., 52 F.Supp. 228 (S.D. Cal. 1943).

¹⁵U.S. v. Colfax Grain Growers, 157 F.(2d) 633 (C.C.A. 9th, 1946); Batt v. U.S., 151 F.(2d) 949 (C.C.A. 9th, 1945).

¹⁶Larson v. Ives Dairy Co., 154 F.(2d) 701 (C.C.A. 5th, 1946); Jones v. Gaylord Guernsey Farms, 128 F.(2d) 1008 (C.C.A. 10th, 1942); Latimer v. U.S., 52 F.Supp. 228 (S.D. Cal. 1943).

fessional in nature and easily adapted to any enterprise or industry, and that they do not perform manual or farm labor. Further, services rendered by clerical workers are not considered to be done "in connection with" the operation and management of a farm. Heretofore, the rule that clerical workers are not agricultural workers has been consistently followed;¹⁷ the instant case seems to relax it.

The employee in the Dairy Inn performed dual services, selling dairy products and doing clerical work. The former services admittedly are agricultural labor since they were performed "in connection with" the operation and management of a dairy farm as such; but the latter services seem not to be within the exemption. Although this employee was not skilled nor professional, the type of work which she performed, in keeping records, was clerical and under past decisions would not be considered agricultural labor. Under the principal decision, apparently an employee who performs both agricultural and clerical work, and who was trained on the farm in his clerical duties, is to be deemed an agricultural laborer; but an employee who performs only clerical work in which he has been formally trained does not come within that exception.

Donald C. Cooley

LIFE INSURANCE—IS INSURER'S ASSUMPTION OF RISK OF EXECUTION
AGAINST PUBLIC POLICY?—POLICY EXCEPTIONS V. INCONTESTABILITY
CLAUSE

A life insurance policy provided that, "If his death shall occur . . . in consequence of any violation of the law . . . then said benefit certificate shall be null and void and of no effect." The by-laws, expressly made a part of the policy, provided that the policy should be incontestable after two years, ". . . except for non-payment of premiums . . . and except also for risks not assumed." The insured paid the premiums for twenty years and then was executed as a consequence of conviction for murder. Beneficiary brings suit to collect the benefits under policy. The Supreme Court, by a three-three decision, upheld a lower court judgment for the plaintiff. HELD: (1) An insurer's assumption of risk of execution in consequence of violation of the law is not against the public policy of the state. (2) The incontestability clause and the exception clause are ambiguous and should be construed in favor of the beneficiary. *Modern Woodmen of America v. Kehoe*, 25 So.(2d) 463 (Miss. 1946).

This decision involves these two broad issues: (1) Is it against public policy for an insurer to assume the risk of death in violation of the law? (2) Does the incontestability clause in a life insurance contract make incontestable all defenses not specifically preserved in it or specifically pointed out?

The decisions are in conflict as to whether recovery may be effected on a life policy where the insured has been executed for a crime. The question first arose in an English case,¹ often called *Fauntleroy's case*, which held that public policy

¹⁷Cases cited *supra* note 16.

¹*Amicable Society v. Boland*, 3 Russ.Ch. 351, 4 Bligh N.S. 194, 5 Eng.Rep.R. 70 (1830).

forbade recovery where the insured was executed for a capital crime.² At the time of this decision the law of forfeitures was in force in England³ and the court has been said to have been giving judicial voice to the law.⁴ This rule as laid down by the English court was followed by the U. S. Supreme Court which refused recovery in the analogous case where the insured committed suicide.⁵ Then in later cases of execution of the insured for criminal offenses the Supreme Court still followed the *Fauntleroy* case.⁶

This is also the rule in a number of the state courts,⁷ which followed the Supreme Court decisions. The more modern trend, followed in the instant case, and indicated by the majority of the recent state decisions, is contrary to the Supreme Court rule.⁸ These courts say that the idea that one would be induced to turn criminal by the prospect of his beneficiaries profiting by his execution, is fanciful and absurd.⁹ They further contend that the proposition is unsound in that here it is the execution and not the criminal act which is preventing recovery. A felon might be convicted, pardoned and then die a natural death and his beneficiary would be eligible for the benefits of the policy though he were just as guilty as one executed for the same offense. Further, a convicted murderer might recover if he died in confinement.¹⁰ There is also public policy against leaving the insured's dependents as wards of the state.¹¹ The fact that the life expectancy tables used by the insurance companies include death by execution seems to indicate that the possibility might be one which the insurer contemplated in the inception of the policy.¹² The modern courts argue moreover that a life insurance policy is a species

²"Suppose that in the policy itself . . . the party insuring had agreed to pay a sum of money, year by year, upon the condition that in the event of his committing a capital felony, and being executed for that felony, his assignees shall receive a certain sum of money; . . . Is it not void upon the plainest principles of public policy? Would not such a contract take away one of those restraints operating on the minds of men against the commission of crime, namely, the interests we have in the welfare and prosperity of our connections? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as the condition went, at least, altogether void?" 4 Bligh N.S. 194,211, 5 Eng.Rep.R. 70,76 (1830).

³The law of forfeitures for crimes was not abolished in England until the statutes of 33 and 34 Vict., c. 23 (1870). The doctrine of forfeitures and contamination of blood was forbidden by the Federal Constitution in this country. U.S. CONST. Art. IV, § 1, par. 2.

⁴*Collins v. Met. Life Ins. Co.*, 232 Ill. 37, 83 N.E. 542 (1907).

⁵*Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139, 18 S.Ct. 30, 42 L.Ed. 693 (1898).

⁶*Northwestern Mut. Life Ins. Co. v. McCue*, 223 U.S. 234, 32 S.Ct. 220, 56 L.Ed. 419 (1911). The court laid down an additional rule that the insurer is under an implied obligation to do nothing which would wrongfully accelerate the maturity of the policy. *Burt v. Union Cent. Life Ins. Co.*, 187 U.S. 362, 23 S.Ct. 137, 47 L.Ed. 214 (1902).

⁷*Scarborough v. Amer. Nat. Life Ins. Co.*, 171 N.C. 353, 88 S.E. 482 (1916); *Smith v. Met. Life Ins. Co.*, 125 Misc.Rep. 670, 211 N.Y.Supp. 255 (1925); *Collins v. Met. Life Ins. Co.*, 27 Pa.Sup.Ct. 353 (1905); *Amer. Nat. Ins. Co. v. Munson*, 262 S.W. 987 (Tex.Civ.App. 1918).

⁸*Allen v. Diamond*, 13 F.(2d) 579 (C.C.A. 7th, 1926); *Collins v. Met. Life Ins. Co.*, 232 Ill. 37, 83 N.E. 542 (1907); *Weeks v. N. Y. Life Ins. Co.*, 128 S.C. 223, 122 S.E. 586 (1924); *Fields v. Met. Life Ins. Co.*, 147 Tenn. 464, 249 S.W. 798 (1923); *Corey v. Mass. Mut. Life Ins. Co.*, 116 W.Va. 63, 178 S.E. 525 (1935); VANCE, *INSURANCE* (2d ed. 1930) 813.

⁹*Collins v. Met. Life Ins. Co.*, 232 Ill. 37, 40, 83 N.E. 542, 544 (1907).

¹⁰*Corey v. Mass. Mut. Life Ins. Co.*, 116 W.Va. 63, 66, 178 S.E. 525, 527 (1935).

¹¹*Weeks v. N.Y. Life Ins. Co.*, 128 S.C. 223, 122 S.E. 586, 589 (1924).

¹²*Id.*, 122 S.E. at 590.

of property and that forfeiture of this property would be in violation of the constitutional provision which prohibits forfeiture of estate.¹³

The other issue, as to whether the broken condition subsequent, i.e., death in consequence of violation of the law, is a contest barred by the incontestability clause¹⁴ is also one upon which the authorities differ.¹⁵ The majority of cases, with which the instant case is in accord, are agreed that the "death in violation of the law" clause is ineffective after the period of incontestability has run; that the incontestability clause renders the other a mere limited exception, available to the insurer before the running of the period.¹⁶ Obviously, this result could be reached only in a state where insuring against death by execution is not in violation of the public policy.¹⁷ These decisions rest upon the theory that the two clauses conflict in meaning and that the normal, average man would believe that he possessed a policy which was incontestable except as stated in the incontestable clause itself.¹⁸ The courts then construe the policy liberally in favor of the insured, so as not to defeat the object of the contract, keeping in mind that the insurer had the power to write the clause and could have made the whole entirely unambiguous.¹⁹ The final result of these cases then is to limit the ability of the insurer to contest, for death "in consequence of a violation of the law," to the two year period.

¹³U.S. CONST. Art. IV, § 1, par. 2.

¹⁴The incontestability clause does not generally make the policy unconditionally incontestable after the expiration of the period but usually states some exceptions, e.g., nonpayment of premiums, fraud, etc. If one of these exceptions which are contained in the clause itself are breached the courts are unanimous in denying the liability of the insurer. VANCE, INSURANCE (2d ed. 1930) § 231. Some courts hold that such a clause may, if it so provides, make the policy incontestable from the date of issuance. *Patterson v. Nat. Premium Life Ins. Co.*, 100 Wis. 118, 75 N.W. 980, 42 L.R.A. 253 (1898). The majority however hold this analogous to a clause making even a fraudulently procured policy incontestable, and so against public policy. *Reagan v. Union Mut. Life Ins. Co.*, 189 Mass. 555, 76 N.E. 217, 2 L.R.A.(N.S.) 821, 4 Ann.Cas. 362, 109 Am.St.Rep. 659 (1905).

¹⁵VANCE, INSURANCE (2d ed. 1930) § 231.

¹⁶*Supreme Lodge v. Overton*, 203 Ala. 193, 82 So. 443 (1919); *Sun Life Ins. Co. v. Taylor*, 108 Ky. 408, 56 S.W. 668 (1900). A like result has been reached in cases involving clauses voiding policies in case of suicide, where the policies also included incontestability clauses. *Mut. Life Ins. Co. v. Lovejoy*, 201 Ala. 337, 78 So. 299, L.R.A. 1918D 860 (1917); *Royal Circle v. Acterrath*, 204 Ill. 549, 68 N.E. 492 (1903); *Goodwin v. Provident Savings Life Assur. Ass'n.*, 97 Iowa 226, 66 N.W. 157, 32 L.R.A. 473 (1896); *Mareck v. Mut. Res. Fund Life Ass'n. v. Payne*, 32 S.W. 1063 (Tex.Civ.App. 1895).

¹⁷APPLEMAN, INSURANCE LAW AND PRACTICE (1941) § 335; *Scarborough v. Amer. Nat. Ins. Co.*, 171 N.C. 353, 88 S.E. 482, L.R.A. 1918A 896 (1916).

¹⁸In the case of *Sun Life Ins. Co. v. Taylor*, 108 Ky. 408, 56 S.W. 668, 94 Am.St.Rep. 383, 6 A.L.R. 449 (1900), the court said, "the language providing that the policy should be incontestable does not restrict it to any particular grounds of contest, but it is broad and comprehensive enough to embrace any and every defense which might have been made to it before the expiration of three years. To say that it has reference to one defense and not to another is writing into the policy terms which the very language of it excludes." This policy had clauses almost identical with those in the instant case. See note 25 *infra* for a contrary view of the construction of an average man.

¹⁹Where the meaning is doubtful, the policy will be construed against the insurer, who was responsible for the phrasing. VANCE, INSURANCE (2d ed. 1930) §§ 179-180.

It appears that a court taking cognizance of the purpose and history of the incontestability clause,²⁰ would reach a more logical decision which would be opposed to the majority. The insurer intends to say that he is estopped from denying the validity of the policy as executed, as, for example, fraud in the inception, but certainly not from denying operation of breached conditions subsequent in the body of the policy. That the insurer may limit the extent of his coverage is a well recognized rule,²¹ but many courts circumvent the "exceptions" by merely saying that they are not exceptions at all but "contests" which are barred by the incontestability clause.²²

Though many courts continue to confuse denial of coverage with the defense or "contest" of invalidity, the line between the two has been clearly drawn by Justice Cardozo.²³ In the latter situation the insurer is attempting to establish the fact that the policy is invalid because of some infirmity in its inception. This type "contest" is of course barred by the incontestability clause. However, in the former situation the insurer is in fact trying to *enforce the terms of the policy* by showing that it did not cover death by certain means. It seems that the better rule is that the insurer should be estopped from denying the validity of the policy as an existing contract of insurance, unless procured by fraud, but should not be denied the right to set up the operation of the terms of the contract as a bar to a suit against him.²⁴ Obviously the courts should not construe contracts of insurance so technically and by such highly ingenious construction as to give a different meaning than that which would be given by an ordinary layman.²⁵

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²⁰"... the object ... was to restrict the insurer to a definite time within which to discover any fraud or misrepresentation made by the insured in the application for insurance and to ... cancel the policy." *MACLEAN, LIFE INSURANCE* (1929) 163.

²¹*Met. Life Ins. Co. v. Conway*, 252 N.Y. 449, 169 N.E. 642 (1930). See the opinion of Cardozo, C.J. which says, "The provision that a policy shall be incontestable after ... a period of two years is not a mandate as to coverage ... It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception or thereafter became invalid by reason of a condition broken." In *Bernier v. Pacific Mut. Life Ins. Co. of Calif.*, 173 La. 1078, 139 So. 629 (1932), the court recognized the *Conway* case as holding that "... a life insurance company may, without doing violence to a provision making the policy incontestable after a stated period, except from the so-called coverage, or risk assumed, any cause of death that the company sees fit to except, provided that the exception shall be expressed so plainly in the policy as to leave no reasonable doubt that the exception is to remain after the policy shall have become otherwise incontestable." It then held an almost identical clause was too ambiguous to come within the rule of the *Conway* case.

²²*Supreme Lodge v. Overton*, 203 Ala. 193, 32 So. 443 (1919); *Standard Life Ins. Co. v. Robbs*, 177 Ark. 275, 6 S.W.(2d) 520 (1928).

²³*Flanagan v. Provident Life and Accident Ins. Co.*, 22 F.(2d) 136 (C.C.A. 4th, 1927).

²⁴*VANCE, INSURANCE* (2d ed. 1930) § 205.

²⁵See Judge Griffith dissenting in *Modern Woodmen of America v. Kehoe*, 25 So.(2d) 463, 470 (Miss. 1946).

MARRIAGE BY PROXY—VALIDITY IN MISSISSIPPI AS EITHER
A COMMON-LAW OR CEREMONIAL MARRIAGE

An American soldier, while stationed in Scotland during the recent war, contracted a marriage by proxy with a woman living in Florida. Thereafter he designated her as beneficiary and wife in his National Service Life Insurance policy. The insured was later killed in action. The United States, pursuant to the National Service Life Insurance Act, brought this suit in the nature of a bill of interpleader, to determine the interests of the named beneficiary and other claimants in the policy. The validity of the proxy marriage was the principal question. HELD: A proxy marriage contracted in Florida is a valid common-law marriage. *United States v. Layton*, 68 F. Supp. 247 (S.D.Fla. 1946).

Marriage by proxy¹ was recognized both at Roman and Canon law,² and by English law as late as the eighteenth century.³ It has been suggested that in our early history there were numerous instances of marriages by proxy between bachelor colonists and women in England, who took advantage of this means of obtaining the protection of coverture before leaving their homes to cross the Atlantic.⁴ However, there are very few reported cases in the United States on this subject,⁵ and none in Mississippi.

The courts of Mississippi would undoubtedly recognize the validity of a marriage contracted by proxy if such were valid in the jurisdiction where celebrated.⁶ However, there is doubt as to the validity, either as a common-law or

¹Marriage by proxy is one of several types of "informal" marriage; other types are marriage by mail contract, marriage by telephone, marriage by cable, and common-law marriage. For a recent, thorough discussion of the entire subject, see Howery, *Marriage by Proxy and Other Informal Marriages* (1945) 13 KAN. CITY L. REV. 48.

²Lorenzen, *Marriage by Proxy and the Conflict of Laws* (1919) 32 HARV. L. REV. 473-483.

³Informal marriages were abolished in England by the modern marriage acts. MARRIAGE ACT, 1836, 6 & 7 WILL. IV, c. 85, § 20; MARRIAGE ACT, 1898, 61 & 62 VICT., c. 58 § 6.

⁴Lorenzen, *Marriage by Proxy and the Conflict of Laws* (1919) 32 HARV. L. REV. 473, 482.

⁵The only reported cases which have been found concerning marriage by proxy are: *In re Lum Lin Ying*, 59 F. 682 (D.Ore. 1894); *Ex parte Suzanna*, 295 F. 713 (D.Mass. 1924); *U.S. ex rel. Aznar v. Com'r of Immigration at Port of N. Y.*, 298 F. 103 (S.D.N.Y. 1924); *U.S. ex rel. Modianos v. Tuttle*, 12 F.(2d) 927 (E.D.La. 1925); *Kane v. Johnson*, 13 F.(2d) 432 (D.Mass. 1926); *Silva v. Tillinghast*, 36 F.(2d) 801 (D.Mass. 1929); *Cosulich Societa Triestina di Navigazione v. Elting*, 66 F.(2d) 534 (C.C.A. 2d, 1933). In each of these cases the wife by proxy marriage to a naturalized citizen of the U.S. was seeking admission to this country outside the immigration quota, as the wife of a citizen. In all the cases except *In re Lum Lin Ying* (see note 6 *infra*), the marriages were held to be valid, and the aliens were allowed to enter the country as "wives" of American citizens. However, it should be noted that in all of these cases the marriages were celebrated in a foreign country where such marriages were recognized as valid by law or custom. The principal case seems to be the first reported American case of a proxy marriage celebrated within the United States.

⁶*Carroll v. Renich*, 15 Miss. 798 (1846); *Walker v. Matthews*, 191 Miss. 489, 3 So.(2d) 820 (1941). The courts followed the general rule that a marriage which is valid where contracted is valid in all other jurisdictions, in all the cases cited in note 5, *supra*, except in *Ex parte Suzanna*, 295 F. 713 (D.Mass. 1924), and in *In re Lum Lin Ying*, 59 F. 682 (D.Ore. 1894). The district court in *Ex parte Suzanna* indicated that it thought that marriage by proxy must be valid under the law of the domicile of the husband as well as under the law of the jurisdiction where the marriage was con-

as a ceremonial marriage, of a proxy marriage celebrated in Mississippi. In the principal case the court stated that Florida recognized only two prerequisites to the validity of a common-law marriage: capacity of the parties, and mutual consent.⁷ By what has been called judicial legislation the Mississippi Supreme Court has added another prerequisite to common-law marriage—cohabitation.⁸ By its nature the usual proxy marriage would not be followed by immediate cohabitation. Hence it would seem that a proxy marriage celebrated in Mississippi would not be valid as a common-law marriage.

Ceremonial marriage is governed by statutes which vary from state to state. For a valid ceremonial marriage in Mississippi, three elements are necessary: legal capacity of the parties, a marriage license, and a ceremony performed by an ordained minister or an authorized official.⁹ Proxy marriage would present no problem as far as the first two elements are concerned. However, the legislature has provided, in the section of the Code entitled, "By whom marriages may be solemnized," that: "Any minister of the gospel ordained, . . . may solemnize the rites of matrimony between any persons *within the state* who shall produce a license granted as herein directed."¹⁰ This would seem to indicate that the legislature intended that both parties to the ceremonial marriage be present at the ceremony and within the state at the time of the ceremony. If this interpretation be taken, a marriage by proxy contracted in Mississippi would also be invalid as a ceremonial marriage. This is the stated opinion of the Attorney General, who seems to base his opinion on the above-quoted section of the Code: "This is to advise that in my opinion there cannot be in this state any proxy marriages, or marriages by telephone, telegraph or radio, and that if persons desire to marry in the State of Mississippi they must appear in person before those authorized to perform the marriage ceremony in this state."¹¹

Certainly the result reached by the court in the principal case was desirable. In general, the law favors marriage and will indulge in every reasonable presumption in favor of the validity thereof.¹² It is submitted that should a case of a bona fide, war-time marriage by proxy arise in our courts, justice would be served if such marriage were to be held valid.

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tracted. However, this point did not influence the decision, since Pennsylvania, the domicile of the husband, recognized common-law marriages as valid, and the court held the proxy marriage to be a valid common-law marriage in Pennsylvania. The court in *U.S. ex rel. Modianos v. Tuttle*, 12 F.(2d) 927 (E.D.La. 1925), stated two qualifications to the general rule, however. These were that even though a marriage is valid where contracted it is invalid if contrary to the express law of the domicile or if contrary to the established tenets of Christendom. The proxy marriage in *In re Lum Lin Ying* was held invalid by the court under the second qualification, as being contrary to the tenets of Christendom. In that case an American citizen of Chinese origin had contracted marriage with a Chinese woman to whom he had been betrothed as a child by his parents, but whom he had never seen.

⁷68 F.Supp. 247, 250 (S.D.Fla. 1946). The only requirement for a valid marriage *per verba de praesenti* at common law was a present agreement by the parties to become man and wife. KEOGEL, *COMMON LAW MARRIAGE* (1922) 42-45.

⁸Pacific, *Common Law Marriage in Mississippi* (1943) 16 Miss.L.J. 40, 47-53.

⁹AMIS, *DIVORCE AND SEPARATION IN MISSISSIPPI* (1935) § 12.

¹⁰MISS. CODE ANN. (1942) § 463. (Italics added)

¹¹BIENNIAL REP. ATT'Y GEN. MISS. (1941-43) 71. It is interesting to note in the principal case that the Attorney General of Florida had rendered a similar opinion.

¹²Alabama & Vicksburg Ry. v. Beardsley, 79 Miss. 422, 30 So. 660 (1901); Sullivan v. Knights of Pythias, 97 Miss. 218, 52 So. 360 (1910); McAllum v. Spinks, 129 Miss. 237, 91 So. 694 (1922).

MASTER AND SERVANT—MASTER'S DUTY TO FURNISH SERVANT SAFE PLACE TO WORK—CHANGING CONDITIONS OF EMPLOYMENT

Intestate was employed to assist in unloading "gyp rock" from a box car to a truck standing 12 to 18 inches away. Loose pieces of the material were packed between the whole sheets. Two men handled each sheet, one walking backward. While walking backward, intestate stumbled over some of the loose material on the floor and fell into the truck. The sheet struck him on the chest and caused fatal injuries. The foreman on the job had been instructed to leave the loose material on the floor. Father of deceased sues employer for damages. **Held:** Judgment for estate of deceased affirmed. Where an employee is working under a foreman, his employer is under a duty to exercise ordinary care to provide a safe working place even though working conditions necessarily are changing constantly so as to increase or diminish the employee's safety. *Wallace v. Long*, 197 S.W.(2d) 20 (Ark. 1946).

The general rule is that the master is under a non-delegable duty to the servant to afford him a reasonably safe place in which to work.¹ In the instant case the court recognized the existence of an exception to the general rule though it did not apply it to the facts. The substance of the exception is that where the servant is working under conditions which are constantly changing, so as to increase or diminish the risk, the burden of making the place safe is on the servant rather than the master.² This exception has been widely adopted.³ Since it is a limitation of the general rule, its applicability is limited strictly to cases in which conditions of work are changing constantly.⁴

The master's liability for failure to furnish a safe place of work arises from a breach of a duty owed to the servant. Where the risks of employment are constant the master has or should have knowledge of the existence of such risks;⁵ and, properly he is under a duty to use ordinary care to protect the servant. On the other hand, where working conditions constantly are changing, so as to increase or diminish the risk, the theory advanced by the courts is that knowledge of the danger should not be imputed to the master.⁶ The purpose of the exception is to relieve the master from liability for injuries to the servant resulting from conditions of which he has no notice and which he is powerless to prevent.⁷ The courts apparently relieve the master from liability because they feel that he cannot foresee the particular hazard which results in injury to the employee.⁸

¹*Masonite Corporation v. Lochridge*, 163 Miss. 364, 140 So. 223 (1932); *Kennedy v. Chase*, 119 Cal. 637, 52 P. 33 (1898); *Wilson & Toomer Fertilizer Co. v. Lee*, 90 Fla. 632, 106 So. 462 (1926); *Ross v. Shanley*, 185 Ill. 390, 56 N.E. 1105 (1900); *Atchison & E. Bridge Co. v. Miller*, 71 Kan. 13, 80 P. 18 (1905); *Fraioli v. New York, N.H. & H.R. Co.*, 286 Mass. 450, 190 N.E. 605 (1934); 1 *MECHEM, THE LAW OF AGENCY* (2d ed. 1914) 1212.

²*Moline Timber Co. v. McClure*, 166 Ark. 364, 266 S.W. 301 (1924); *G.M.&N.R. Co. v. Brown*, 143 Miss. 890, 108 So. 503 (1926).

³*Howell v. Harvill*, 185 Ark. 977, 50 S.W.(2d) 597 (1932); *New Union Coal Co. v. Sult*, 172 Ark. 753, 290 S.W. 580 (1927); *Powell v. Shurling*, 51 Ga.App. 67, 179 S.E. 653 (1935); *Purvin Coal Co. v. Fike*, 238 Ky. 376, 38 S.W.(2d) 201 (1931); *Owenby v. Tallassee Power Co.*, 194 N.C. 129, 138 S.E. 529 (1927).

⁴*Bidwell v. Grubb*, 198 Mo.App. 655, 201 S.W. 579 (1918).

⁵*Coast Ship Co. v. Yeager*, 120 Miss. 152, 81 So. 797 (1919); *Benton v. Finkbine Lumber Co.*, 118 Miss. 558, 79 So. 346 (1918).

⁶*Rinehart & Dennis Co., Inc. v. Brown*, 137 Va. 670, 120 S.E. 269 (1923).

⁷*City of Tupelo v. Payne*, 176 Miss. 245, 168 So. 283 (1936).

⁸*La Grand v. Arkansas Oak Flooring Co.*, 155 Ark. 585, 245 S.W. 38 (1922).

The necessity for an exception to the general rule where conditions of work are changing is questioned. If the master can foresee the dangerous condition and fails to abate it, he should be liable because he has failed to use ordinary care to protect his servant. On the other hand, even under the general rule, he is not liable for harm resulting from dangerous conditions of which he is not aware, and which by a reasonable inspection he would not have discovered.⁹ To impose liability on the employer for unforeseeable occurrences is to require from him a standard of conduct far superior to that required by the general rule.¹⁰ In a factual situation where the dangerous conditions of work are found to be unforeseeable, the master would not be liable under the general rule. Why should the courts use the "changing conditions of work" exception? The exception ordinarily seems to produce the desired result, but such result more properly could be reached by applying the general rule and holding that the master has used the ordinary care required by the general rule.¹¹

The result in the instant case is sound. The master had notice of the existence of the dangerous condition and instructed his foreman to ignore it. The court was correct in applying the general rule.

Clarence E. Morgan, Jr.

NEGLIGENCE—PERSON NEGLIGENTLY PLACING HIMSELF IN PERIL LIABLE FOR INJURIES TO RESCUER

Defendant walked in front of a car which she had parked on an incline without placing it in gear or applying the emergency brake. Plaintiff, seeing the car rolling toward defendant, dashed in front of it, rescued the defendant, but was himself injured. Plaintiff brought suit based on defendant's negligence. **HELD:** A person placing himself in peril through lack of self-protective care violates a duty owed to possible rescuers. *Carney v. Buyea*, 65 N.Y.S.(2d) 902 (N.Y. 1946).

In general, for recovery in a negligence action, three elements are essential: first, the existence of a duty on the part of defendant to protect the plaintiff from the injury of which he complains; second, failure of defendant to perform that duty; and third, an injury to the plaintiff actually and legally resulting from defendant's violation of duty.¹ The principal case involves the nature and extent of the duty owed the rescuer in the rescue cases.

The facts of the principal case are somewhat different from the usual "rescue" case in that here the rescuer is bringing his action against the negligent defendant who placed *herself* in peril, whereas ordinarily the "rescue" cases involve the rescuer's action against a negligent defendant who has placed a *third person* in peril. In the latter type of "rescue" case, the majority of American courts have allowed the rescuer to recover. The rule laid down in these cases is that if one party, through his negligence, places another person in peril, then the negligent person is liable to anyone injured in attempting a rescue, provided that the action of the

⁹*Holland v. Durham Coal & Coke Co.*, 131 Ga. 715, 63 S.E. 290 (1909); *Armour v. Golkowska*, 202 Ill. 144, 66 N.E. 1037 (1903); *McGuire v. Bell Tel. Co.*, 167 N.Y. 208, 60 N.E. 433 (1901).

¹⁰See note 1 *supra*.

¹¹"The changing-place-of-work doctrine is merely a convenient manner of saying that the master acted as a reasonably prudent man under such circumstances, and, therefore, should not be held responsible." Note (1940) 12 Miss. L.J. 459, 464.

¹PROSSER, TORTS (1941) 175.

rescuer is not so rash and reckless as to constitute contributory negligence.² The courts have held that, in itself, the act of risking death or injury to save another from peril is not as a matter of law contributory negligence,³ and have stated that life is valued so highly that negligence will not be imputed to an attempt to save it. Moreover, as the rescuer's act usually is performed under the stress of emergency, the standard of care required is much lower than that required in less exigent circumstances. Further, the contributory negligence of the party in peril will not bar a recovery to the rescuer.⁴

Many of the prior decisions in the rescue cases have based the liability of the negligent party to the rescuer on a duty owed to the person in peril, thus basing the rescuer's cause of action on a derivative duty.⁵ These cases have been criticized⁶ by those following the theory of duty laid down by Justice Cardozo in the *Palsgraf* case⁷ on the ground that no one can recover through a violation of a duty owed another but must base his cause of action on a violation of duty owed himself. The latter rule has been recognized by some authorities as an elementary principle of tort law.⁸

Some of the writers⁹ have indicated that, on principle, the instant decision does not conflict with the existing law in the rescue cases. Logically the present case seems to be in accord with the best reasoning in other rescue cases. Justice Cardozo perhaps pointed the way toward the present decision in the famous *Wagner*

²*Eckert v. Long Island R. Co.*, 43 N.Y. 502, 3 Am.Rep. 721 (1871); *Billingsley v. Illinois Cent. R. Co.*, 100 Miss. 612, 56 So. 790 (1911); *Corbin v. Philadelphia*, 195 Pa.St. 461, 45 A. 1070 (1900); COOLEY, *TORTS* (4th ed. 1932) § 487; 1 STREET, *FOUNDATIONS OF LEGAL LIABILITY* (1906) 133; 1 THOMPSON, *COMMENTARIES ON THE LAW OF NEGLIGENCE* (2d ed. 1901) § 198; Note (1922) 19 A.L.R. 4. But see PROSSER, *TORTS* (1941) 187, 359 criticizing the doctrine of the "rescue" cases as outside the ordinary pattern of duty and foreseeability.

³*Ravinski v. Rouse*, 131 F.(2d) 687 (C.C.A. 6th, 1942); *Cote v. Palmer*, 127 Conn. 321, 16 A.(2d) 595 (1940); *Sarrott v. Holston Quarry Co.*, 174 S.C. 262, 177 S.E. 135 (1934); *Shultz v. Dallas Power & Light Co.*, 147 S.W.(2d) 914 (Tex.Civ.App. 1940); *RESTATEMENT, TORTS* (1934) § 472; Note (1945) 158 A.L.R. 189. *Contra*: *Oklahoma Power & Water Co. v. Jamison*, 188 Okla. 118, 106 P.(2d) 1097 (1940).

⁴*Hatch v. Globe Laundry Co.*, 132 Me. 379, 171 A. 387 (1934); *Norris v. Atlantic Coast Line R. Co.*, 152 N.C. 505, 67 S.E. 1017, 27 L.R.A.(N.S.) 1069 (1910); *Bond v. Baltimore & Ohio R. Co.*, 82 W.Va. 557, 96 S.E. 932, 5 A.L.R. 201 (1918); Note (1920) 5 A.L.R. 206.

⁵*Donahoe v. Wabash, St. Louis & Pac. R. Co.*, 83 Mo. 560, 53 Am.Rep. 594 (1884); *Brown v. Columbia Amusement Co.*, 91 Mont. 174, 6 P.(2d) 874 (1931); *Dupuis v. New Regina Trading Co., Ltd.*, 4 D.L.R. 275 (1943); *Anderson v. Northern R. Co.*, 25 U.C.C.P. 301 (1875); see also cases cited *infra* note 12.

⁶BOHLEN, *STUDIES ON THE LAW OF TORTS* (1926) 569.

⁷*Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

⁸*Heaven v. Pender*, 11 Q.B.D. 503 (1883); PROSSER, *TORTS* (1941) 178; Goodhart, *Consequences of a "Negligent Act,"* CAMBRIDGE LEGAL ESSAYS (1926) 109.

⁹WINFIELD, *TEXT-BOOK OF THE LAW OF TORT* (1937) 42; BOHLEN, *STUDIES ON THE LAW OF TORTS* (1926) 569, states that the rescuer's right of action rests not upon the violation of duty owed the one in peril, but upon the tendency of that action to cause some bystander to attempt a rescue. "And it would seem that a person who carelessly exposes himself to danger or who attempts to take his life in a place where others may be expected to be, does commit a wrongful act towards them in that it exposes them to a recognizable risk of injury."

case¹⁰ in which he stated, "Danger invites rescue . . . The wrong that imperils life is a wrong to the imperiled victim; it is also a wrong to his rescuer," thus implying that the rescuer was not recovering through a duty owed to the person in peril, but through a duty owed to himself. If a duty is owed to the possible rescuer not to place third persons in peril, logically everyone who places himself in a position of peril by a lack of self-protective care also violates a duty owed a possible rescuer.¹¹ Some courts place no such duty upon the individual, but on the contrary state that a person owes himself no duty to refrain from imperiling his own life. Such reasoning was adopted in *Saylor v. Parsons*¹² where the court refused recovery to the rescuer and in effect held that the rescuer's right of action rests only upon a derivative duty. It is submitted however, that the assumption that a person is not negligent to himself cannot be decisive as to his negligence to another. Legal negligence is "conduct falling below the standard established by law for the protection of *others* against unreasonable risk of harm."¹³ If the sum total of defendant's actions were such as to cause an unreasonable risk of harm to plaintiff, he was negligent and therefore liable for the injury resulting from that negligence.

The fact that the contributory negligence of the party imperiled is no bar to the rescuer's action against a third person, should be sufficient indication that the duty owed to the rescuer is not a derivative duty, but a direct duty owed the rescuer by the negligent person. Otherwise the contributory negligence of the imperiled party would bar the rescuer's action. If the duty owed the rescuer is derived from the duty owed the person in peril, then logically the contributory negligence of the imperiled person would also be derived or imputed to the rescuer, thus defeating the rescuer's action.¹⁴

In the rescue cases the negligence which caused the peril and thereby induced the rescuer's action is held to be the proximate cause of the injury sustained by the rescuer.¹⁵ The fact that a rescuer acts after having weighed the situation to deter-

¹⁰*Wagner v. International R. Co.*, 232 N.Y. 176, 133 N.E. 437, 19 A.L.R. 1 (1921). *Accord*: *Legan & McClure Lumber Co. v. Fairchild*, 155 Miss. 271, 124 So. 336 (1929).

¹¹In *Brugh v. Bigelow*, 310 Mich. 74, 16 N.W.(2d) 668, 671, 158 A.L.R. 184, 189 (1944), on facts similar to the principal case, the court, in giving judgment for the plaintiff, stated: "Defendant's claim that he owed himself and his rescuer no duty is without merit. His cries for help belied his claimed freedom from duty." The case is discussed in (1945) 43 MICH. L. REV. 980 and (1945) 10 Mo. L. REV. 321.

¹²22 Iowa 679, 98 N.W. 500, 64 L.R.A. 542, 101 Am.St.Rep. 283 (1904). *Accord*: *Ala. Power Co. v. Conine*, 213 Ala. 228, 104 So. 535 (1925); *Linz Realty Co. v. McDonald*, 133 S.W. 535 (Tex. 1911). *But see* *Butler v. Jersey Coast News Co.*, 160 A. 659, 660 (N.J.L. 1932), in which the court, though stating the case was not a "rescue" case, gave judgment for the plaintiff, who was injured in attempting to rescue a person who had placed himself in peril, on plaintiff's right as a user of the highway "to exercise a power to either aid in removing the obstruction or assisting anyone who appeared to be in danger."

¹³PROSSER, TORTS (1941) 175.

¹⁴*Pittsburgh, C. & St. L. R. Co. v. Lynch*, 69 Ohio St. 123, 68 N.E. 703 (1903); Note (1943) 21 CAN.B.REV. 758.

¹⁵*Blanchard v. Reliable Transfer Co.*, 71 Ga.App. 808, 32 S.E.(2d) 420 (1944); *Arnold v. Northern States Power Co.*, 209 Minn. 551, 297 N.W. 182 (1941); *Highland v. Wilsonian Investment Co.*, 171 Wash. 34, 17 P.(2d) 631 (1932). POLLOCK, TORTS (13th ed. 1929) 498, states, "The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue."

mine whether he should follow his impulse to save the imperiled person does not break the continuity between the defendant's negligence and the injury to the rescuer. The deliberation of the rescuer does not shorten the chain of jural causes nor constitute his action an intervening force; it is sufficient that the rescuer's act, whether impulsive or deliberate, is the "child of the occasion."¹⁶

The result reached in the instant case seems proper both from a social and from a legal viewpoint. The holding is in accord with established principles of the law of negligence and is the logical result and complement of the rule laid down in the leading case of *Eckert v. Long Island R. Co.*¹⁷ that a negligent defendant is liable for injuries sustained by one who attempts rescue of the person imperiled by defendant's negligence. No substantial legal difference exists between the duty relationship or the proximate cause of the injury in the *Eckert* case and the instant case.

John K. Keyes

TAXATION—CABARET TAX—RIGHT TO SUE FOR REFUND WHERE ERRONEOUSLY PAID

Claimant, a restaurant owner, was advised by the Collector of Internal Revenue that his restaurant was subject to the cabaret tax.¹ Claimant collected the tax as a separate item on the check of each patron and paid the money to the Collector of Internal Revenue. Later the Collector of Internal Revenue ruled that the claimant's restaurant neither was nor had been a "cabaret" within the taxing statute. Claimant sought to recover this tax money but recovery was denied because the claimant had not refunded the taxes to its customers. The claimant then brought suit to recover. **HELD:** The restaurant owner was designated taxpayer by the taxing statute; items on its patrons' checks labeled "tax" were actually part of the price paid by the patrons; the money collected became that of the restaurant owner; and he was entitled to a refund of the cabaret tax erroneously paid although no refund was made to the patrons. *123 East Fifty-Fourth Street, Inc., v. United States*, 157 F.(2d) 68 (C.C.A. 2nd, 1946).

Ordinarily an action to recover taxes collected illegally or by mistake is similar to an action in assumpsit for money had and received. Such a suit can be maintained only when the defendant has money in his hands belonging to another, which *ex equo et bono* he ought to pay over to that other.²

A taxing statute may provide that the one seeking the refund of an excise tax must establish that he has borne the economic burden of the tax. Such a stipulation will be upheld and the one seeking the refund will be required to establish that

¹⁶*Wagner v. International R. Co.*, 232 N.Y. 176, 133 N.E. 437, 438, 19 A.L.R. 1, 4 (1921). *Accord:* *Da Rin v. Casualty Co. of America*, 41 Mont. 175, 108 P. 649, 27 L.R.A.(N.S.) 1164, 137 Am.St.Rep. 709 (1910).

¹⁷43 N.Y. 502, 3 Am.Rep. 721 (1871).

¹INT. REV. CODE § 1700(e) (1939), as amended by Revenue Act of 1941, § 5421.

²*Bailey v. Railroad Co.*, 22 Wall. 604, 22 L.Ed. 840 (1874); *Cary v. Curtis*, 3 How. 236, 11 L.Ed. 576 (1845); *Hartford Mills v. Rose*, Collector of Internal Revenue, 61 F.(2d) 441 (C.C.A. 5th, 1932); *Duffin v. Lucas*, 55 F.(2d) 786 (C.C.A. 6th, 1932); *Champ Spring Co. v. United States*, 47 F.(2d) 1 (C.C.A. 8th, 1931); *Engineers Club of Philadelphia v. United States*, 42 F.Supp. 190 (Ct.Cl. 1941); *Ralston Purina Co. v. United States*, 58 F.(2d) 1065 (Ct.Cl. 1932); *Nichols v. Commissioner of Corp. & Taxation*, 34 Mass. 285, 50 N.E.(2d) 76 (1943).

he actually has borne the burden. This is true whether the tax was listed as a separate item on the customers' checks or was included in the price of the article sold.³

The taxing statute more often does not specify that the person seeking a refund must establish that he has borne the economic burden of the tax. Some statutes of this type designate the person who is the legal taxpayer; others do not expressly designate a taxpayer as such. Where the taxing statute is silent as to who is the legal taxpayer, the cases fall into two groups. In the first the economic burden of the tax has been passed on to customers as a separate and distinct item on the customers' checks. Recovery is not allowed in these cases unless it be shown that the amount of the tax has been refunded or will be refunded to the persons who have borne the economic burden of the tax.⁴ An exception to this is found in the decision of the Mississippi Supreme Court in *Independent Linen Service Co. v. Stone*.⁵ That case held that, although the excise tax in question was collected as a separate item from the claimant's customers and erroneously paid into the state treasury, the claimant could recover such tax money since the claimant possibly might be compelled to refund the amount collected to its customers. The court, however, expressly refrained from determining whether the customers could or could not recover from the claimant.

In the second type of case arising under a statute which is silent as to who is the legal taxpayer, the claimant has not listed the tax as a separate and distinct item on the customers' checks. In this type of case he has included the tax in the total price of the article sold or in the total price of the customers' checks. Under such facts it has been held that the claimant cannot recover because he has not paid money of his own into the state treasury.⁶ The reasoning in this decision seems inconsistent with the principle that the final incidence of a tax does not determine who is the taxpayer.⁷ Further, the decision does not seem to be in harmony with the cases holding that a customer who has borne the economic burden of a tax merged in the price of the article may not recover the amount

³*Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143 (1937); *Upchurch Packing Co., Inc. v. United States*, 151 F.(2d) 983 (C.C.A. 5th, 1945); *Cudahy Packing Co. v. U.S.*, 126 F.(2d) 429 (C.C.A. 7th, 1942); *Grain Belt Supply Co. v. Commissioner of Internal Revenue*, 109 F.(2d) 490 (C.C.A. 8th, 1940); *Williams v. U.S.*, 48 F.Supp. 647 (Ct.Cl. 1943); *C. M. McClung & Co. v. U.S.*, 35 F.Supp. 464 (Ct.Cl. 1940).

⁴*United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 54 S.Ct. 443, 76 L.Ed. 859 (1934); *American Chain Co., Inc. v. Hartford-Connecticut Trust Co.*, 86 F.(2d) 105 (C.C.A. 2nd, 1936); *Shannopin Country Club v. Heiner, Collector of Internal Revenue*, 2 F.(2d) 393 (W.D.Pa. 1924); *Engineers Club of Philadelphia v. United States*, 42 F.Supp. 182 (Ct.Cl. 1941); *Benzoline Motor Fuel Company v. Bollinger, State Director of Finance*, 353 Ill. 600, 187 N.E. 657 (1933); *Indian Refining Co. v. Bollinger, State Director of Finance*, 337 Ill. 122, 168 N.E. 886 (1929); *Standard Oil Co. v. Bollinger, State Director of Finance*, 337 Ill. 353, 169 N.E. 236 (1929).

⁵192 Miss. 832, 6 So.(2d) 110 (1942).

⁶*Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S.W.(2d) 1174 (1937). This seems to be the only case directly in point.

⁷*Biddle v. Commissioner of Internal Revenue*, 302 U.S. 573, 58 S.Ct. 379, 82 L.Ed. 431 (1938); *Lash's Products Co. v. U.S.*, 278 U.S. 175, 49 S.Ct. 100, 73 L.Ed. 251 (1929); *Shearer v. Commissioner of Internal Revenue*, 48 F.(2d) 552 (C.C.A. 2nd, 1931).

of tax from the seller who has recovered the same or has been excused from paying the tax after having collected it from his customers.⁸

A different case arises where the taxing statute names the person designated as the legal taxpayer. Under such a statute a corporation which promoted boxing contests and transmitted to the government the amount of taxes collected from the patrons as a separate item on the patrons' checks brought suit to recover alleged overpayments. The corporation was not allowed to recover because the taxing statute had named the person paying for admission as the legal taxpayer.⁹ The principal case is to be distinguished in that the statute under which the tax in question was levied named the restaurant owner as the legal taxpayer. Therefore the restaurant owner was allowed to recover without having refunded the amount of the taxes to its patrons. The restaurant owner was without a doubt given a windfall but the intention of the legislature in designating him taxpayer in the statute was evident.

John C. Webb.

⁸*Johnson v. Igelheart Bros.*, 95 F.(2d) 4 (C.C.A. 7th, 1938); *Heckman Co. v. I. S. Dawes & Son Co.*, 56 App.D.C. 213, 12 F.(2d) 154 (1923); *Christopher v. Hoyer & Co.*, 160 Misc. 21, 289 N.Y.S. 105 (1936); *Planters Nut & Chocolate Co. v. Brown-Murray Co., Inc.*, 28 Pa.Super. 239, 193 A. 381 (1937). The sellers in this line of decisions did not recover the tax refunds by means of court action. The taxes in question were refunded to them outside of court; therefore, their legal right to such a recovery was not determined.

⁹*Twentieth Century Sporting Club v. United States*, 34 F.Supp. 1021 (Ct.Cl. 1940).



